TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 524

CITY OF OPELIKA, APPELLANT,

vs.

OPELIKA SEWER COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

FILED AUGUST 27, 1923

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[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

In Equity

BILL OF COMPLAINT—Filed Jan. 14, 1922

To the Honorable Henry D. Clayton, Judge of said Court:

The Plaintiff, Opelika Sewer Company, a corporation, avers and showeth unto this Honorable Court:

1. That it is a corporation created and existing under the laws of the States of Alabama, with its principal place of business in the City of Opelika, in said State, having the corporate power to build and construct or acquire by purchase or otherwise, and to maintain and operate a sanitary sewer plant and disposal works, and to carry on the business of furnishing for hire a sanitary sewer service to municipalities, corporations, firms and individuals, and to acquire, erect or construct water works, flushing tanks, reservoirs and such other plants as may be required, and to hold, purchase, dispose of, and convey such real or personal property as the nature of its business may require; that the amount of its subscribed and paid in capital stock is, to wit: $50,000.

[fol. 2] 2. That the City of Opelika, in the State of Alabama, is a municipal corporation under the laws of the State of Alabama.

That on, to wit: April 22, 1902, an ordinance was adopted by the District of Opelika, which was a municipal corporation and the corporate name under which the City of Opelika was then operating and which the City of Opelika is the successor in corporate and municipal interests, amending a previous ordinance of said municipality adopted November 7, 1901, as amended, gave and granted to The Sanitary Sewer Company, of Philadelphia, which was a corporation, its successors and assigns, permission and authority to lay pipes and conduits and erect the necessary sewerage disposal works, and such other plant as may be required, and to maintain and operate the same for a period of thirty years from the adoption of said ordinance, a substantial copy of which ordinance, as amended, is hereto annexed as a part hereof for the purpose of reference thereto as often as may be necessary, and marked Exhibit "A."

3. That, to wit: in the month of February, 1902, the said The Sanitary Sewer Company, of Philadelphia, by an instrument of writing, transferred and assigned to Plaintiff all of the rights, privileges and franchises given and granted to it by said District of Opelika on November 7, 1901, and amended on November 19, 1901, and Plaintiff is now owner of all of the rights, franchises, powers and privileges granted to the said The Sanitary Sewer Company, of Philadelphia, by the said original and amended ordinances.

4. That under and pursuant to the said amended ordinance of April 22, 1902, Plaintiff, during the year 1902, begun, and during to wit: the year 1903 completed, the construction of a sanitary sewer system and disposal works in said City of Opelika, and has continued to operate and maintain the same to the present time, serving said City and the inhabitants thereof. Plaintiff avers that during all of said period and until, to wit: January 1, 1922, it continued to serve [fol. 3] the said City of Opelika and the inhabitants thereof with its said sewerage system at the rate of charge in said amended ordinance specified.

5 Plaintiff avers that the fair and reasonable cost to it for the construction of said sewerage system and disposal works was, to wit, $85,000; that in order to raise the funds necessary to meet such expenditures it was necessary for Plaintiff to raise and it did raise by issurance of bonds, secured by mortgage on it's said property, in the aggregate amount of, to wit, $70,000, bearing interest at the rate of 5 per cent per annum, which bonds are still outstanding and unpaid. That Plaintiff has expended in and about the improvement and betterment of it's said system the sum of, to wit: $5,000, or more. That during the period, to wit, from January, 1904, to, to wit: December, 1920, the gross receipts of the Company from the operation of it's said sewerage system were, to wit: $59,834.16, and that the total operating expenses were, to wit: $38,352.09; that the profits in excess of operating expenses were to wit: $21,482.08, during which period the interest on it's said bonded indebtedness of $70,000 amounted to, to wit: the sum of $59,500. That the gross operating receipts during the year 1921 was the sum of to wit: $5,330.58, while it's total operating expenses for the year 1922 will be practically the same as for the year 1921. That there is now accrued, outstanding and unpaid interest on said bonds amounting in the aggregate to the sum of, to wit $36,333.34. That Plaintiff is also otherwise indebted for Bills and Accounts payable in large amount, to wit: $7,500, all of which was incurred and reasonably expended in the economical management and operation of said system; that at no time during the operation of said system has it been able to earn any dividends upon its capital stock. That the fair and reasonable cost of replacing Plaintiff's said sewerage system and it's fair and reasonable value at this time is the sum of, to wit: $140,000.

6. That on account of the losses accruing to the Plaintiff in the operation of it's said system its burden of debt has been unbearable; that the rate of charges specified in the said amended ordinance of [fol. 4] April, 1902, is wholly inadequate and does not in any sense afford plaintiff a just, fair and reasonable return on its investment and a continuation of the service under said rates will amount to a confiscation of its property. Plaintiff avers that the City of Opelika was without power or authority to fix any irrevocable rates or charges for plaintiff's said service, and its attempt so to do by said ordinance was and is void and of no effect, but in an effort to relieve the situation, and in a measure provide for revenues commensurate with the

service, and to insure in some degree, a fair return upon its property employed in the service, and in the interest of harmony, and with hope of obtaining its cooperation, plaintiff petitioned the Council of the City of Opelika for permission to increase its rates in the manner and to the extent set forth in its petition, a substantial copy of which is hereto annexed, marked Exhibit "B," and made a part hereof. That said petition was presented to and be heard by said Council at a meeting duly held on December 19, 1921, and although the statements of facts therein set forth were not controverted the prayer of said petition was denied, and no relief whatever was granted plaintiff. Plaintiff avers that subsequent to the action of said City Council in denying plaintiff the relief sought, the plaintiff, upon advice of its counsel, promulgated and put in force for its service from and after January 1, 1922, the rates specified in paragraph 5 of its said petition, which said rates are not unfair or unreasonable to the inhabitants of said City, and the enforcement thereof is absolutely necessary to afford plaintiff, in some degree a fair return upon the value of the property employed in its said system; that plaintiff by publication, and by mail, gave notice to its patrons that said rates would be charged for the service rendered, and the payment thereof enforced, a copy of which notice or publication is hereto attached, marked Exhibit "C," and made a part thereof.

7. That the only practical way open to plaintiff to enforce the payment of the new rates thus promulgated and prescribed by it is to [fol. 5] discontinue the service upon refusal or failure of the customer to pay the rates thus prescribed. That not only did the City Council of said City of Opelika deny Plaintiff's petition, but the Mayor of said City of Opelika immediately after the publication by Plaintiff of the notice to its patrons aforesaid, caused a notice to be published in the *in the* papers of Opelika advising and warning the citizens of Opelika not to pay said increased rates, but to offer to the Manager of Plaintiff Company the old rates which they had theretofore paid, and no more, "and to leave the rest to (me) him." That as a result of this publication and the opposition of the Mayor of said City to the new rates prescribed by plaintiff, only a small portion of their customers have paid their bills or any part of their bills for the quarter beginning January 1st, and ending March 31, 1922, which bills are by the rules of the Company, and for a long series of years have been, payable in advance, and not more than one half the customers have tendered even the old rates. That Plaintiff is advised and informed that the said Mayor of said City of Opelika and the said City Council will exert any and all power they possess to prevent the enforcement by Plaintiff of the new rates thus prescribed by it, to the end that it will be necessary for plaintiff to shut off and discontinue the service to a great many of its customers, which in all probability will result in innumerable suits against the Plaintiff for damages and cause it untold annoyance, expense and damage to its business generally, and that in order to shut off many such customers it will be necessary to dig up some of its sewer connections in the streets or alleys of the City of Opelika, in which event in all

probability Plaintiff will be prosecuted by said City under certain of its ordinance making it a penal offense for any person to dig up the streets or sidewalks without the consent of the Mayor; that the Mayor of said City has already announced that he will grant to Plaintiff no permit to dig up the streets of said City, and he has also instructed the Police Department of said City to institute prosecutions against the Plaintiff, its servants agents and employees [fol. 6] in the case they dig up or attempt to dig up *or attempt to dig up* any of the streets of said City for the purpose of shutting off or discontinuing the supply of its service to any of its customers or patrons.

The City of Opelika, through its attorney, has given notice to the Plaintiff or its counsel that in the event it refused to continue serving and operating the said sewer system at the rates prescribed in said ordinance of April, 1902, the City would institute proceedings under the Act of the Legislature of Alabama, approved February 15, 1919, entitled "An Act to amend section 3513 of the Code of Alabama," which act provides that: "Whenever any person, firm or corporation operating or maintaining any public utility and having enjoyed franchises under contract with any City, town, or other municipal subdivision to render any public or quasi public service to such city, or subdivision, or the inhabitants thereof, shall fail, after reasonable notice of default in the performance of such contract, to comply with and perform the same in the manner provided in such contract, the governing body of such city, town, or other subdivision, may by bill or petition apply to the chancery court or other court of like jurisdiction, to enforce the forfeiture of the rights and franchises, and if a corporation, to annul the charter of such a corporation," etc. That while Plaintiff denies any right on the part of the said City to proceed under said act, and denies that it has incurred any liability under said Act, yet nevertheless, in the event of such proceeding the Plaintiff would be put to a great cost, annoyance and damage, its credit greatly impaired, and it would be seriously embarrassed in financing its opposition.

It is manifest that, in view of the opposition of said City Council and the position maintained by its Mayor, that the City Authorities will exercise all the rights and powers which the City may possess, civilly and criminally, to prevent the enforcement by the Plaintiff [fol. 7] of said new rates and to persuade the patrons and customers of the Plaintiff to refuse to pay the same, and to thereby hinder and embarrass the Plaintiff in the enforcement of it's rights in its premises, unless the Plaintiff is protected in the enjoyment of its property and property rights by a decree of this Honorable Court, and without such process or decree the operation of Plaintiff's said property will be wholly impracticable and unremunerative, amounting to a practical confiscation of its property.

8. Plaintiff again avers that the rates prescribed in said amended ordinance of April 22, 1902, are wholly unremunerative, confiscatory, and wholly inadequate to afford a just, fair or reasonable return upon the fair and reasonable value of the property of Plaintiff employed in said service, and if Plaintiff is compelled to continue its service at

the rates therein specified it will result in the taking of and confiscation of its property, without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States; and Plaintiff again avers that the rates promulgated, fixed and prescribed as set forth in its said petition to the City Council of Opelika are just, fair and reasonable, and Plaintiff is entitled to enforce same, and to the injunction process of this Honorable Court against any interference on the part of the City of Opelika, its officers, agents or employees with Plaintiff, its officers, agents or employees in the enforcement or the attempted enforcement of such rates. Plaintiff avers that it is remediless in the premises except by the decree and process of this Honorable Court.

Plaintiff avers that the matter involved in this controversy, exclusive of interest and cost, exceeds the sum of $3,000.00, and that the controversy herein presented is one involving the construction and application, and arising under the provisions of the 14th amendment to the Constitution of the United States, towit; forbidding the taking of Plaintiff's property without due process of law, and guaranteeing to Plaintiff the equal protection of the laws.

[fol. 8] 9. Plaintiff makes party defendant to this bill of complaint the City of Opelika, in the State of Alabama.

The premises considered, Plaintiff humbly prays that this Honorable Court assume jurisdiction in the premises; that the City of Opelika be made a party defendant hereto, and that a subpœna issue to it out of this Honorable Court commanding it to plead, answer or demur to this bill of complaint within the time required by law and the rules of this Honorable Court, oath being waived or failing therein that a decree proconfesso be entered against it; that an injunction pendente lite be issued commanding the said City of Opelika, its officers, agents, servant and employees from taking any action, civil or criminal, to compel the Plaintiff to maintain the rates for its service set forth in the said amended ordinance of April, 1902, and from in any matter proceeding against Plaintiff, civilly or criminally, or otherwise, to prevent the enforcement by it of the rates prescribed by it as set forth in Exhibit "B" hereto annexed, to the end that if said rates so prescribed by Plaintiff be found to be fair and reasonable, that Plaintiff may enforce such rates for its service without molestation or hinderance on the part of the City of Opelika, its officers, agents or employees; and that upon final hearing such injunction be made perpetual; that if Plaintiff is mistaken in the relief herein specifically prayed, it prays for all such other, further, different and general relief to which it may show itself entitled in the premises, and to which this Honorable Court may seem meet and proper.

Barnes & Walker, Steiner, Crum & Weil, Attorneys for Plaintiff.

[fol. 9] STATE OF ALABAMA,
Montgomery County:

Before me, M. C. Mixon, a notary public in and for the State and County aforesaid, personally appeared M. D. Morgan, who, being by me duly sworn, that he is the General Manager for the Opelika Sewer

Company, the Plaintiff in the above entitled cause; that he has read the for-going bill of complaint and has the knowledge of the facts therein set forth, and that the averments in said bill contained are substantially true as alledged.

M. D. Morgan.

Subscribed and sworn to before me, this January 13, 1902.
M. C. Mixon, Notary Public, Montgomery Co., Ala.

[fol. 10] EXHIBIT "A" TO BILL OF COMPLAINT

Ordinance Authorizing Sanitary Sewer Co. to Construct Sewer System

Be it ordained by the Mayor and the Aldermen of the District of Opelika, Alabama, that an ordinance passed on the 7th day of November, 1901, at an adjourned meeting of the said Mayor and Aldermen of the District of Opelika, entitled "An ordinance to provide a system of improved sanitary sewers for the District of Opelika, Alabama, to consent to the use of the streets, lanes and alleys of said District for the construction of such sewers, and to contract with The Sanitary Sewer Company, of Philadelphia, Pennsylvania, its successors and assigns, to build and operate the system under the provision of this ordinance," be amended so as to read as follows:

An ordinance to provide a system of improved sanitary sewers for the District of Opelika, Alabama; to consent to the use of the streets, lanes and alleys of said District for the construction of such sewers, and to contract with the Sanitary Sewer Company, of Philadelphia, Pennsylvania, its successors and assigns, to build and operate the said system under the provisions of this ordinance.

Whereas, great public benefit is to be derived by the inhabitants of the District of Opelika from an improved system of sanitary sewerage whereby great convenience to our citizens and a healthy condition in said District will be secured; and;

Whereas, a large amount of capital will be required to be invested in the construction and maintenance of said sanitary sewerage system, which cannot be provided by said District without borrowing a considerable sum of money, the interest upon which would greatly increase the expense of governing said District; and,

Whereas, the Mayor and Alderman of said District are desirious to induce the investment of a sufficient amount of capital to promptly [fol. 11] establish said sewerage system and to maintain and conduct the same, and to that end are willing to hold in abeyance any right or authority which they may possess or hereafter acquire to construct and maintain a separate system of sewers on its own account and to refrain, so long as the contract herein expressed shall be faithfully carried out by the said The Sanitary Sewer Company, its successors and assigns, from entering into any contract with any

other person or persons, corporation or corporations, for the purpose of constructing or maintaining sewers:

Now therefore,

Section 1. Be it ordained by the Mayor and Aldermen of the District of Opelika, that permission be and is hereby given to The Sanitary Sewer Company, of Philadelphia, Pennsylvania, its successors and assigns, to lay pipes and conduits and erect the necessary sewerage disposal works, and such other plant as may be required, and maintain and operate the same for a period of thirty years from the adoption of this ordinance, under the following conditions:

First. That so long as the system of sewers to be constructed and maintained pursuant to the provisions of this ordinance, and any extension thereof, furnishes adequate sewer service to the inhabitants of the District of Opelika, upon the terms and conditions herein provided, the said District of Opelika will not construct a separate system of sewers on its own account, or enter into any contract or contracts with any person or persons, corporation or corporations, for the purpose of procuring the construction and maintainance of sewers other than these herein provided for; provided, however, that nothing herein contained shall in any way affect the right of the District of Opelika, to acquire the system of sewers herein provided for by the purchase in accordance with the terms of this ordinance.

Second. The District of Opelika hereby consents and agrees with the said The Sanitary Sewer Company, its successors and assigns, [fol. 12] that they shall have full power and authority, in accordance with the terms of this ordinance, to use all such streets, alleys and lanes and public places within the corporate limits of the District of Opelika, for purpose of laying and maintaining such pipes, conduits, sewers, man-holes, catch-basins, disposal plants and such other appurtenances, appliances, and material as may be necessary to provide an adequate system of Sanitary sewerage for said District, and for the purpose of making such repairs and extensions to said system, during the period for which this ordinance shall be operative, as may be necessary for its proper maintain-ce and use.

Third. The said The Sanitary Sewer Company, its suc-essors and assigns, shall exercise due care and diligence in the use of all lanes, streets, alleys and other public places, and shall cause no unnecessary obstruction to public travel in, upon or over the same or any part thereof, and shall not unnecessarily interfere with any other pipes or conduits now in said streets, and the said The Sanitary Sewer Company, its successors and assigns, shall use all reasonable precautions against accidents or danger to person or property while engaged in laying sewers authorized by this ordinance, and shall cause all excavations and openings in said streets, or obstructions thereof, to be properly lighted or *gaurded* at night and shall restore all streets, lanes and alleys to their former condition, as nearly as may be without unnecessary delay, and the said The Sanitary Sewer Company, its Successors and assigns, shall execute to said

District of Opelika, a bond, in the sum of two thousand dollars, with a good and sufficient surety company as surety to be approved by the Mayor and Aldermen of said District of Opelika, and condition to construct and maintain said system of sewers in accordance with plans and specifications approved by the Mayor and Aldermen of the District of Opelika, payable to said District of Opelika; and conditioned further to indemnify and save harmless the said District [fol. 13] of Opelika from any liability, for any accident or injury to person or property that may occur in consequence of the construction of said system of sewers or any part thereof during the process of constructing the same.

Fourth. The general plan of the sewerage system shall be as follows: Sewers shall be of the best quality, salt glazed, terra cotta pipes truly cylindrical and laid upon a true gradiant, the joints made tight by first class cement mortar, or they shall be made of first class hard burned brick, laid in first class cement mortar or of iron or steel as the requirement of the locality may demand. Manholes, shall be placed over the sewers not over six hundred feet (600) apart and covered with approved cast iron covers strong enough to sustain the greatest and heaviest traffic. The sewers shall be laid at such a depth below the surface of the streets as to give a fall of not less than three (3) inches in ten (10) feet from adjacent property. No sewer pipe shall be less than six (6) inches in diameter, and all sewers shall be large enough to provide for the easy flow of all sewerage. Adequate disposal works shall be provided for the treatment and removal of sewerage by approved sanitary methods, and in such manner that the effluent water shall be rendered innocuous either by filtration or chemical treatment or by both as conditions may require.

Fifth. The said The Sanitary Sewer Company, its successors and assigns, shall furnish free of charge to the said District of Opelika such sewer service as may be required for the City Hall, the County Court House, so long as said City Council shall have their office and Council Chamber in said Court House, the City Schools, and all other municipal offices during the period for which this ordinance shall be operative, but nothing in the above requirements shall be construed to mean that the said The Sanitary Sewer Company, its successors and assigns, shall be liable for the expense of making the necessary connections, which expense shall be borne and paid by said District, and in consideration of, and for the above required [fol. 14] free sewer service for said buildings and offices, the said The Sanitary Sewer Company, its successors and assigns, shall have the right, and the right is hereby conceded for the period during which this ordinance shall be operative, to connect with any and all water pipes or mains owned or controlled by the said District for the purpose of flushing the said sewer system by means of flush tanks in place, or otherwise, and the water required for this purpose, not exceeding twelve thousand (12,000) gallons each day, shall be furnished by the said District to the said The Sanitary Sewer Company, its successors and assigns, free of charge during the period in

which this ordinance shall be operative. And in further consideration of such free service to said City Hall and other City offices, the said District of Opelika shall pay a sum annually, equal to all taxes and licenses on said sewer system, due to said District of Opelika, by the said The Sanitary Sewer Company, its successors and assigns, during the period in which this ordinance shall be operative.

Sixth. The said The Sanitary Sewer Company, its successor and assigns, are hereby authorized to charge not in excess of the following annual rates for sewer service which said rates may be collected quarterly in advance.

Schedule of Rates

Dwelling houses:

Where only one attachment is made:

Water closet	$5.00
Bath Tub	4.00
Hydrant or Cellar Drain	4.00
Kitchen or other sink	3.00
Stationary Wash Basin	1.50
Urinal	1.50

Where any two, and not more, attachments, one of a kind, are made:

Water Closet	$4.50
Bath Tub	3.60
Hydrant or Cellar Drain	3.60
Kitchen or other sink	2.70
Stationary Wash Basin	1.35
Urinal	1.35

Where any three, or more attachments, one of a kind, are made:

Water Closet	$4.25
[fol. 15] Bath Tub	$3.40
Hydrant or Cellar Drain	3.40
Kitchen or other sink	2.55
Stationary Wash Basin	1.28
Urinal	1.28

Each additional attachment, more than one of a kind:

Water Closet	$2.00
Bath Tub	1.50
Hydrant or Cellar Drain	2.00
Kitchen or other sink	1.00
Sanitary Wash Basin	1.00
Urinal	.75
Laundry tubs, each set of three or less	$2.00

Hotels, Stores, Public Buildings, Factories, etc.:

Each Water Closet Basin	$5.00
Each Stationary Wash Basin	1.50
Each Bath Tub	4.00
Each Kitchen or other sink	5.00
Each Hydrant or Cellar Drain	4.00

Laundries, Breweries, Livery Stables, Ice Factories, Slaughter Houses, special rates. All connections of whatever description not enumerated in above schedule, special rates.

All bills for sewer service shall be paid quarterly in advance by the owner or owners of the property connected with said sewer system.

All special rates shall be fixed by mutual agreement between the parties interested, and in proportion to the charges aforesaid.

No connection shall be made to the sewer system without a permit from the said The Sanitary Sewer Company, its successors and assigns, and all connections shall be made by them, or under their supervision.

Seventh. After the expiration of ten (10) years from the acceptance of the contemplated system of sewers by the District of Opelika the said District shall have the right to purchase the said system of sewers, provided that it shall give notice in writing to the owner of said system of sewers or their legal representatives of its intentions to do so, three months prior to the expiration of the said ten (10) years. The price to be paid for the said system of sewers by said District shall be ascertained and determined as follows: The District of Opelika through its proper officials shall appoint two appraisers, one of whom shall be an expert civil engineer, and the Opelika Sewer [fol. 15½] Company, to which the rights of the Sanitary Sewer Company of Philadelphia, have been assigned and transferred its successors and assigns shall also appoint two appraisers, one of whom shall be an expert engineer, and the said two appraisers so appointed shall appoint a fifth appraiser, and none of said appraisers shall be a resident of the District of Opelika, or a stockholder in, or bondholder of the corporation then owning said system *of system* of sewers or in any other way interested therein. The five appraisers thus chosen shall constitute a commission to determine the money value of the system of sewers and the award made by said commission shall include as a part of the valuation of the property the then net earning capacity of said system as shown by the net earnings of the preceding years and the District of Opelika shall within three months after the above named commission shall have made its reward, pay the amount so awarded in cash, or at the option of the said District in bonds of the said District bearing the then legal rate of interest at their market value. The failure by the District of Opelika to pay the award within the time mentioned shall operate only as a waiver of the right to purchase until the expiration of five (5) years thereafter, when the right to purchase shall again be open to said District of

Opelika under the same conditions, and the same right shall continue to be open at the expiration of each succeeding five (5) years upon the same terms and conditions as herein above set forth.

Eighth. The said The Sanitary Sewer Company, its successors and assigns, shall submit to the Mayor and Aldermen of the District of Opelika, their plans, specifications and surveys of the sewer system proposed, which when approved by said Mayor and Aldermen, and not until so approved, shall constitute the system hereby authorized. To this system extensions may be made either by order of the District of Opelika or at option of the said The Sanitary Sewer Company, its successors and assigns, provided however, that the said The [fol. 16] Sanitary Co., its successor and assigns, provided, however, that the Sanitary Sewer Company its successors and assigns, shall not be required to extend the system to a locality that is not at the time sufficiently built up to return a reasonable revenue, and the said The Sanitary Sewer Company, its successors and assigns, shall have reasonable time to make all extensions lawfully required by said District.

Ninth. The said District shall pass such ordinance with adequate penalties as may be necessary for the protection and proper use of the sewers and their necessary connections Catch-Basins, Man-Holes and other appurtenances, and it is understood and agreed that the ordinances which are to be *pas* passed in connestion with the provisions of this ordinance, shall form a part of this contract, and shall remain in full force and effect until such time as said District shall acquire said sewer system by purchase.

Tenth. The preliminary survey and other engineering work of said sewer system shall be commenced within sixty (60) days after this ordinance shall have taken effect; and the construction of sewers shall be commenced within three months after said date, and the entire system shall be completed within six (6) months from the day this ordinance takes effect.

Eleventh. During the construction of said sewers, the Engineer of District of Opelika, shall from time to time, and may at any and all times inspect the work done by the said The Sanitary Sewer Company, and the materials by them used, and should any departure from the accepted plan, specifications and survey occur, he shall at once call the attention of the said The Sanitary Sewer Company, its successors and assigns or their legal represen-tives, to the fact in writing, and the said The Sanitary Sewer Company, its successors and assigns or their legal represen-tives, shall cause the work to be corrected in accordance with the plans, specifications and survey adopted and accepted by the said District of Opelika. Upon completion of the system in accordance with the plans and specifications, and survey, the [fol. 17] District Engineer shall notify the District of Opelika, that the work done and the material furnished is — accordance with the plan, specifications and survey adopted by the said District of Opelika; whereupon the Mayor and Aldermen shall pass an ordinance re-

citing the fact and accepting the said system, and all the rights, and privile*d*ges and remaining obligations of this ordinance shall thenceforth be in full force and effect.

Twelfth. Within thirty (30) days from the first day of December, 1901, after this ordinance shall have taken effect, the said The Sanitary Sewer Company, its successors and assigns, shall file with the clerk of the District of Opelika their written acceptance thereof and of the obligations, terms and conditions of this ordinance, which shall thereupon become and be a contract between said The Sanitary Sewer Co., its successors and assigns and the District of Opelika.

Thirteenth. Full assent is hereby given to a charter by the General Assembly of Alabama, or under the general incorporation laws of the State of Alabama, incorporating a body corporate under the name of Opelika Sewer Company. And when said Sewer Company is incorporated, it may become the assignee of the said The Sanitary Sewer Company, as to all rights, franchises, privileges and contractual rights granted by virtue of this ordinance, but shall be subject to all the obligations, liabilities, conditions and disabilities herein imposed by this ordinance, and especially shall such assignment be subject to the right of purchase herein reserved by the District of Opelika upon the terms and specifications of such purchase herein prescribed.

Fourteenth. If the Opelika Sewer Company, successor to The Sanitary Sewer Company, its successors an- assigns, shall at any time abandon or cease to operate said system of sewers, then and in that event the Mayor and Aldermen of the District of Opelika may by ordinance declare said system of sewers abandoned by said Opelika Sewer Co., its successors or assign- and thereupon the District of Opelika may, at its option, take possession and control of said system of sewers, and operate the same as the property of the Dis- [fol. 18] trict of Opelika until such a time as the said system shall be acquired by the District under the conditions of purchase herein provided, or until the operation thereof shall be resumed by the said Opelika Sewer Company, its successors or assigns, provided that upon the adoption of such ordinance a written notice thereof together with a statement of the specific act of abandonment or failure to operate said system by the Opelika Sewer Company, shall be mailed to the Opelika Sewer Company at its office in Opelika, Alabama, and a simila- notice and statement shall be mailed addressed to The City Trust, Safe Deposit & Surety Company as Trustees, Philadelphia, Pa., and the said Opelika Sewer Company, or in its stead, the City Trust, Safe Deposit & Surety Company shall have the right, either or both, to resume control and operation of said system of sewers at any time within sixty (60) days from the date of the mailing of said notice at the post office at Opelika, Ala., upon the payment to the District of Opelika of any and all expenditures made by said District of Opelika in the improvement, protection or betterment of said system of sewers during the time the said system is operated by said District. But if the said Opelika Sewer Company its suc-

cessors and assigns, and the said The City Trust, Safe Deposit & Surety Co., as Trustees shall fail, after the expiration of said period of sixty (60) days, to resume the operation of said system, and repay said District of Opelika said sums so expended, the franchise conferred by this ordinance shall thereupon be forfeited to the District of Opelika."

Section 2. Be it further ordained, that all ordinances or parts of ordinances inconsistent with the provision of this ordinance be and they are hereby repealed.

Adopted November 19, 1901; amended April 22, 1902.

[fol. 19] "EXHIBIT B" TO BILL OF COMPLAINT

Petition of Opelika Sewer Company to the Council of the City of Opelika

The Opelika Sewer Company respectfully shows unto the Council of the City of Opelika as follows:

1. This Company is now operating and since the year 1903 has been operating a sanitary sewer system in the City of Opelika, the system of the Company supplying sanitary sewerage for practically the entire City of Opelika; that during the time that this Company has been operating its sewerage system in Opelika it has been charging and collecting for the sewerage service rendered to the inhabitants of Opelika the following quarterly rates, towit:

Dwelling Houses:

Where only one attachment is made: Water Closet, $1.25; Bath Tub, $1.00; Hydrant or Cellar Drain, $1.00; Kitchen or other Sink, $0.75; Stationary Wash Basin, $0.37½; Urinal, $0.37½.

Where any two, and not more, attachments, one of a kind are made: Water Closet, $1.12½; Bath Tub, $0.90; Hydrant or Cellar Drain $0.90; Kitchen or other sink, $0.67½; Stationary Wash Basin, $0.33¾; Urinal, $0.33¾.

Where any three or more attachments, one of a kind, are made: Water Closet, $1.06½; Bath Tub, $0.85; Hydrant or Cellar Drain, $0.85; Kitchen or other sink, $0.63¾; Sanitary Wash Basin, $0.32; Urinal, $0.32.

Each additional attachment, more than of a kind: Water Closet, $0.50; Bath Tub, $0.37½; Hydrant or Cellar Drain, $0.50; Kitchen or other sink, $0.25; Stationary Wash Basin, $0.25; Urinal, $0.18¾.

Hotels, Stores, Public Buildings, Factories, etc.:

Each Water Closet Basin, $1.25; each sanitary Wash Basin, $0.37½; each Bath Tub, $1.00; each Kitchen or other sink, $1.25; each Hydrant or Cellar Drain, $1.00; each Urinal, $0.37½; Laundry Tubs, three or less, $0.50.

All connections of whatever description not enumerated in above schedule: Special rates.

Under this schedule of rates for the year ending December 31st 1920, this Company received the sum of $5,296.68 gross from the operation of its plant; that the operating expenses for the year were [fol. 20] $2,784.24, leaving a net operating profit of only $2,512.44; that for a period of ten years prior to said year 1920, the annual gross operating receipts from said plant did not exceed the amount of the year 1920, and the operating profits for the said period of ten years immediately preceeding the year 1920 were for no year in excess of $2,801.57, and were, in fact, usually considerably less than said amount. That from the 1st day of January, 1904 to the 31st day of December, 1920, the total gross receipts of this Company from the operation of its plant were $59,834.16, its total operating expenses were $38,352.09, and its total operating profits for said period were $21,482.08 whereas the interest alone on the Company's bonded indebtedness of $70,000.00 for said period amounted to $59,500.00. That the gross operating receipts for the year 1921 are substantially the same as for the year 1920, and the operating profits for the year 1921 will be substantially the same as for the year 1920.

2. That in order to build said sewer system this Company issued at the time of its organization bonds in the sum of $70,000.00, bearing interest at the rate of five per cent per annum, and the proceeds from the same were used in building said system. All of said bonds are now outstanding and unpaid, and on account of the fact that the earnings of the Company are so meager that no year has the Company received from the operation of its sewerage system an amount sufficient to pay the interest for that year, the interest on the bonds has not been paid in full on the same, there now being accrued and unpaid on said bonds interest amounting to the sum of $36,333.34. That the Company is also indebted in a large sum in bills payable which have accrued during the operation of said plant under said schedule of rates above set out and on account of the meager earnings of the Company from said rates. That at no time during the operation of said system has this Company paid or been able to pay any dividends on the capital stock of the Company, which capital stock amounts to $50,000.00.

[fol. 21] 3. The Company avers that the value of its sewerage system used in rendering sewerage service to the inhabitants of Opelika is $148,934.88; that the Company has recently had its system appraised by a competent engineer, towit: William McLean, who constructed the sewer system in the year 1902-3, and an affidavit of said William McLean showing the physical condition and value of said sewer system is filed with the City Clerk at the time of filing this petition.

4. This Company represents that said schedule of rates above set out are entirely inadequate to furnish a fair return of the sewerage system of this Company used in furnishing sewer service to the in-

abitants of the City of Opelika. That the schedule of rates are holly insufficient for the purpose of such a fair return and are nbearable and can not be continued without resulting in the in-lvency of this Company and the confiscation of its property.

5. The Company further represents that in order to obtain a fair eturn upon a fair valuation of its property used in serving the in-abitants of Opelika, it proposes to put in operation on January 1, 922, the following schedule of rates for sewerage service in Opelika, Alabama, which are just and reasonable, payable quarterly, in ad-ance, towit:

Dwelling Houses:

Where only one attachment is made: Water Closet, $2.50; Bath Tub, $2.00; Hydrant or Cellar Drain, $2.00; Kitchen or other Sink, $1.50; Stationary Wash Basin, $0.75; Urinal, $0.75.

Where any two, and not more, attachments, one of a kind, are made: Water Closet, $2.25; Bath Tub, $1.80; Hydrant or Cellar Drain, $1.80; Kitchen or other Sink, $1.35; Stationary Wash Basin, $0.67; Urinal, $0.64.

Each additional attachment, more than one of a kind: Water Closet, $1.00; Bath Tub, $0.75; Hydrant or Cellar Drain, $1.00; Kitchen or other Sink, $0.50; Stationary Wash Basin, $0.50; Urinal, $0.37½.

Where any three or more attachments, one of a kind, are made: Water Closet, $1.12½; Bath Tub, $1.70; Hydrant or Cellar Drain, $1.70; Kitchen or Sink, $1.27½; Stationary Wash Basin, $0.64; Urinal, $0.64.

Hotels, Store-, Public Buildings, Factories, etc.:

Each Water Closet Basin, $2.50; Each Stationary Wash Basin, $0.75; Each Bath Tub, $2.00; Each Kitchen or other Sink, $2.50; Each Hydrant or Cellar Drain, $2.00; Each Urinal, $0.75; Laundry [fol. 22] Tubs, three or less, $1.00 each.

All connections of whatever description not enumerated in above schedule: Special rates.

And this Company respectfully petitions the Council of the City of Opelika that this Council permit and authorize this Company to put into force and effect, on January 1, 1922, the schedule of rates for sewer service set out in paragraph 5 above, and prays that this Council duly pass an ordinance authorizing this Company to put into effect said schedule of rates on said date.

Respectfully, Opelika Sewer Company, By M. D. Morgan, Manager.

Sworn to and subscribed before me by M. D. Morgan, this the 23rd day of November, 1921. W. Scott Farly, Notary Public, Lee County, Ala.

[fol. 23] "EXHIBIT C" TO BILL OF COMPLAINT

Notice to the Sewer Users of Opelika

Opelika, Ala., Dec. 28, 1921.

To the Patrons of the Opelika Sewer Company:

On and after January 1, 1922, our — for sewer service will be double that heretofore in force. All charges are payable in advance.

We regret very much that it is necessary for us to make this increase in our rates, and only take this action in order to enable this Company to continue to furnish sewerage to the citizens of Opelika. Our plant has been operated for eighteen years under the rates which are now doubled, and during this entire time the total net operating profits of the Company have not sufficed to pay even one-half of the interest on the $70,000.00 of five per cent bonds of the Company. In fact there has accrued and is now unpaid over $36,000.00 of interest on these bonds. To continue to operate under the old schedule of rates would result only in the insolvency of this Company whose service is so necessary to the health and comfort of the people of Opelika.

We do not ask our patrons at this late day to help us pay our past losses, but only to pay us for the service we render at a rate that will, to some extent, assure us a fair return on the actual value of the plant devoted to their service. In fact, these new rates will assure us of a return of not over five per cent per annum on this actual value of the Company's sewerage system.

Yours very truly, Opelika Sewer Company.

[File endorsement omitted.]

[fol. 24] UNITED STATES OF AMERICA,
The Middle District of Alabama,
Eastern Division, *ss*:

SUMMONS AND SERVICE—Filed Jan. 18, 1922

The President of the United States of America to the City of Opelika, in the State of Alabama, Greetings:

You are hereby commanded to appear before the District Court of the United States of America for the Eastern Division of the Middle District of Alabama, in chancery, at Opelika, in said District, within twenty days after this subpœna upon you, exclusive of the day of such service, to *to* answer the bill of complaint, of the Opelika Sewer Company a corporation, this day filed in the Clerk's office at said Court, in said Opelika, then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you — default.

For the Marshall of the United States for the Middle District of Alabama to execute.

Witness, the Honorable Henry D. Clayton, Judge of the District Court of the United States of America for the Middle District of Alabama, and the seal of said Court hereunto affixed.

Issued at Opelika, in said District this 14th day of January, 1922.

George Stuart, Clerk, By Joseph B. Duke, Deputy.

MEMORANDUM.—The within named defendant is notified that it is required to file its answer or other defense, in the Clerk's office of said Court, at Opelika aforesaid, on or before the 20th day after the [fol. 25] service of this subpœna, excluding the day thereof; otherwise the bill of complaint may be taken pro confesso.

George Stuart, Clerk, By Joseph B. Duke, Deputy.

The City of Opelika hereby accepts service of the within summons and waives service by the Marshal this acceptance to have the same effect, and the same effect only, as service by the Marshal upon the paper official of the City would have.

This January 16, 1922.

The City of Opelika, By Dickinson & Dickinson, N. D. Denson & Sons, (Its attorneys).

[File endorsement omitted.]

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

In Equity

OPELIKA SEWER COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF OPELIKA, Defendant.

MOTION TO DISMISS BILL OF COMPLAINT—Filed Feb. 6, 1922

Comes the defendant in this cause, and move the Court to dismiss the bill of complaint, and assigns the following grounds for the motion, to wit:

1. The facts set forth in the bill are insufficient to constitute a valid cause of action in equity.

2. The bill shows on its face that it is without equity.

3. The bill shows on its face that no rates for supplying sewer service by the plaintiff were fixed, or attempted to be fixed by the defendant, but on the contrary the bill shows that at the time the

ordinance which is made an exhibit to the bill of complaint and a part of the bill was adopted, the defendant City was without any sewers or sewerage system, and without any rates fixed for sewer service; that said ordinance was adopted by the defendant City in the exercise of its business or proprietary power for the purpose, on the part of the defendant, of securing and getting established a sewerage system in the defendant City, and sewer service for the defendant and its inhabitants, and that amongst the condition or terms set out in said ordinance, were these: that the plaintiff's assignor, its successors and assigns, should for sewer services, charge not exceeding certain maxima rates expressed in said ordinance, and that the ordinance privileges and maximum rate should extend over a period of 30 years; and the bill further shows that the plaintiff, as assignee of the said ordinance privileges and franchise, accepted the same with all the conditions and terms therein expressed, and constructed its sewer system in defendant City, under said ordinance [fol. 27] and has supplied the defendant and its inhabitants sewerage service under said ordinance, and its terms and conditions, for a period of nearly nineteen years next before the filing of the bill in this cause.

4. The bill of complaint shows on its face that The Sanitary Sewer Company, of Philadelphia, a corporation, entered into an ordinance contract with defendant City, whereby it secured from the respondent the rights and privileges expressed in said ordinance of installing in and under the streets of defendant City, a sewerage system, whereby the corporation, its successors and assigns, might supply to the defendant and its inhabitants sewerage service for a period of thirty years, upon certain conditions and terms expressed in said ordinance, amongst which conditions and terms is this: that the charges for sewer service should not exceed the rate of charges expressed and shown by the schedule set out in said ordinance; and that the complainant is the assignee of The Sanitary Sewer Company, of Philadelphia, of said ordinance contract, and files this suit as such assignee, that it, the complainant, installed the sewer system in and under the streets of the Respondent City, under the terms and conditions expressed in said ordinance contract, which said ordinance is an exhibit thereto and is made a part of the bill of complaint in this cause, and the bill shows that plaintiff has exercised the rights and privileges secured by said ordinance for a period of at least eighteen years prior to the filing of this suit, and that plaintiff is bound by the terms and conditions of said ordinance to supply sewerage service to defendant and its inhabitants for a period of thirty years from the time of the acceptance of said ordinance by plaintiff, and the thirty years period has not expired, and will not expire for several years hence, and it does not appear by the bill that defendant has decreased, or attempted to decrease, charges for sewer service as specified in said ordinance, nor is it made to appear by the bill that the ordinance contract is void.

[fol. 28] 5. For that it appears, from the allegations of the bill, that the plaintiff is estopped from insisting that the maxima charge

fixed by the ordinance contract is confiscatory, and is estopped from insisting upon any change being made in the terms of the contract, with respect to the charges therein provided for the sewer service to the City and its inhabitants.

6. For that the allegations of the bill show that the City of Opelika had no sewers or sewer system at the time The Sanitary Sewer Company, of Philadelphia, assignor of the plaintiff, procured by the ordinance made a part of the bill of complaint, the franchise right and privilege to install the sewer system upon the conditions named in said franchise contract, one of which conditions was that, the charge for sewer service should not exceed the amounts named and specified in said contract; and plaintiff, as assignee of The Sanitary Sewer Company, of Philadelphia, installed the sewer system in the City of Opelika, and has been operating and receiving its specified charges for service under said contract for a period — eighteen or nineteen years without any complaint, and it, therefore, appears that the complainant has been guilty of such laches as bars it from maintaining this suit.

7. Said bill taken in connection with Exhibit A made a part thereof, shows that no contract was made between The City of Opelika and the plaintiff or its assignor as to the rates for sewer service to be charged by the plaintiff, but that said ordinance contract merely fixed a maximum charge for such service.

8. Plaintiff moves to dismiss or strike from that part of section 6, of the bill in this language, "Plaintiff avers that the City of Opelika was without power or authority to fix any irrevocable rates or charges for plaintiff's said sewer service, and its attempt to do so is void and of no effect." And defendant assigns these grounds for the motion (*a*) The said averment or part of sec. 6 states merely the conclusion of the pleader, merely.

(*b*) That said part of sec. 6, is but the statement of the conclusion [fol. 29] and the facts should have been set out so that the Court could determine whether or not such power or authority existed.

N. D. Denson of Council for the Defendant. N. D. Denson & Sons, Henry K. Dickinson, Dickinson & Dickinson, Attorneys for the Defendant.

Before me, George Stuart, Clerk of the United States District Court for the Middle District of Alabama, personally appeared J. G. Palmer, who being first duly sworn deposes and says that he is the Mayor of the City of Opelika, Ala., and that the allegations in the foregoing motion are true.

J. G. Palmer, Mayor of the City of Opelika, Ala.

Sworn to and subscribed to before me this the 17th day of February 1922. George Stuart, Clerk of the U. S. District Court for the Middle District of Alabama.

[File endorsement omitted.]

[fol. 30] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

ORDER GRANTING INJUNCTION PENDENTE LITE AND DENYING MOTION TO DISMISS—Filed April 3, 1922

This cause coming on to be heard upon the motion of the plaintiff for the injunction pendente lite, and also upon the motion of the defendant to dismiss the bill:

Now come the parties, and the cause having been argued by their respective counsel, and the matter having received due consideration by the Court, it is the opinion of the Court that the writ of injunction should issue as prayed for, and that the motion to dismiss the bill of complaint should be denied.

It is therefore considered, ordered and decreed that upon the plaintiff entering into bond, with surety, in the sum of Five Thousand Dollars, payable to defendant, and conditioned for the payment to the defendant, and to any other person or party, all such damages as it or they may suffer by reason of the issuance of the writ of injunction, if it shall be made to appear that said writ was wrongfully issued, such bond to be approved by the Clerk of this Court, the writ of injunction issue as prayed for, restraining the City of Opelika, its agents, officers and employees, and all other persons, from taking any action, civil or criminal, in any other Court or tribunal, to compel the plaintiff to maintain the rates for its service set forth in the amended ordinance of April, 1902, made an exhibit to the bill, and from in any manner proceeding against the plaintiff to prevent the enforcement by it under its reasonable rules and regulations, the rules prescribed by plaintiff set forth in Exhibit B to the bill in this cause.

[fol. 31] It is further ordered, adjudged and decreed that the motion to dismiss the bill of complaint be and is denied.

Done this the 3rd day of April, 1922.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed April 8, 1922

Comes now the defendant in this cause, and for answer to the bill, and each paragraph therein, separately and severally, says and alleges as follows:

1. The defendant admits the allegations contained in section 1 of the bill of complaint.

2. Answering section 2 of the bill, defendant admits the allegations contained in said section.

3. Answering section 3 of the bill, defendant admits the allegations contained therein, and further answering said section, defendant avers and alleges that, the plaintiff has also, by virtue of its position as assignee of The Sanitary Sewer Company, of Philadelphia, assumed and is under legal obligations to conform and comply with all the conditions and requirements imposed upon its assignor by said ordinance.

4. Answering section 4 of the bill, defendant admits the allegations contained in said section.

5. Answering section 5 of the bill, defendant says and alleges that it is not advised as to the cost of construction of the sewerage system and disposal works installed by the plaintiff in the City of Opelika and, therefore, does not know whether $65,000.00 was necessary to be raised by the plaintiff to meet the expenditures for the construction of said sewerage system and disposal works, but it denies that sewerage system installed as it was by the plaintiff, cost the plaintiff *cost the plaintiff* the sum of $65,000.00. Defendant further answering that section, admits that bonds were issued by the plaintiff in the sum of $70,000.00, and secured by a mortgage on [fol. 33] plaintiff's property, but this defendant does not know the necessities of plaintiff that induced it to issue the bonds, and defendant denies the allegations of said section as to the necessity to issue the bonds to meet expenditures in constructing the sewerage system and disposal works, for it is alleged the cost of such construction was $65,000.00; and it also alleged in section 2 of the bill that the plaintiff had a paid up capital of $50,000.00. Defendant admits that said bonds bear interest of 5 per cent. per annum, and defendant further admits that said bonds are still outstanding and unpaid. And defendant denies that the plaintiff used $70,000.00 raised by the bonds, in defraying the expenses of installations of its sewerage system.

Further answering said section, this defendant says that it has no knowledge or information other than the alleged — in the said section, in respect of the improvement and betterment of the said sewerage system, and demands proof of same. But, on information and belief, the defendant alleges that the $5,000.00 alleged in said section as having been expended for the purposes above just mentioned, was used in extending the line of works of the plaintiff so that it could serve other customers, and that said further line was established after the plaintiff had completed its system of sewerage originally.

Further answering said section of the bill, the defendant denies that from January, 1904, to December, 1920, the gross receipts of the Company from the operation of its sewerage system were only $59,834.16, and demands proof of the same; and defendant alleges

that it was more than that. Defendant further answering said section, denies that the operating expenses for the period of time just mentioned, was as much as $38,352.09, and demands the proof with respect to the same. This defendant, further answering, is not advised as to the amount of profits received by the plaintiff in excess of its operating expenses, and it demand- proof of the same. Neither is this defendant advised or informed as to the amount of interest [fol. 34] plaintiff paid on its bonded indebtedness during the period mentioned in said section of the bill, but is willing to admit the same as alleged. This defendant is not advised, nor has it any information with regard to plaintiff's gross operating receipts during the year 1921, and demands the proof that it was not over the sum of $37,330.58; and defendant denies that the operating expenses during the time mentioned was the sum of $3,207.98, and demands the proof thereof.

Further answering, defendant is not advised what the plaintiff's operating expenses will be during the year 1922, but denies that it will be as much as it was during the year 1921, and demands the proof; as to the plaintiff's receipts for 1922, this defendant neither denies nor admits the allegations in respect thereto, but demands the proof. Further answering, defendant denies that there is outstanding interest on plaintiff's bonds to the amount of $36,333.34, and demands proof of same.

Further answering, this defendant alleges that it is not advised as to the plaintiff's outstanding accounts and bills, and the amount thereof, $7,500.00, and demands proof of the allegations in respect thereto. But plaintiff denies that the amount was expended in the economical management and operation of plaintiff's sewerage system, and demands proof of same; this defendant, further answering, says it does not know whether plaintiff has paid any dividend on its stock, but alleges that if not it was because of inferior management, and defendant denies the allegation that no dividends have been paid.

Answering the last sentence in section 5 of the bill, this defendant emphatically denies the allegations contained in it and demands strict proof of same.

Further answering said last sentence of section 5 of the bill, defendant alleges that a fair and reasonable cost of replacing plaintiff's sewerage system would be about $40,000.00; defendant alleges that the present value of said sewerage system is not exceeding $30,000.00.

[fol. 35] 6. Defendant answering section 6 of the bill of complaint says it does not know what plaintiff's loss in operation of the sewer system has been, denies it is unbearable and demands proof of same allegation. Defendant alleges, however, that if the debt is unbearable it has become so by reason of insufficient management. And defendant denies that the charge for the sewer service specified in the ordinance of April, 1902, is inadequate, and denies that they do not afford plaintiff a fair and reasonable return for plaintiff's investment; and defendant denies that a continuation of the service

under the maxima charges specified in the ordinance will amount to confiscation of plaintiff's property.

Further answering, this defendant denies that it fixed in said ordinance any irrevocable rates, but it avers that it was capable of and had the power to agree with plaintiff on charges for sewer service, as were stated in the ordinance, and here this defendant alleges that at the time the ordinance granting the privilege to construct, establish and maintain the sewer system in Opelika, was adopted, defendant was a City having less, and not more, than 6,000 population, and section 228 of the Constitution of Alabama was at that time and still is in words and figures as follows:

"Sec. 228. No city or town having a population of more than six thousand shall have the authority to grant to any person, firm, corporation or association the right to use streets, avenues, alleys, or public places for the construction or operation of water works, gas works, telephone or telegraph line, electric light or power plant, steam or other heating plants, street railroads, or any other public utility, except railroads other than the street railroads for a longer period than thirty years."

And this defendant at this time had no sewerage system, nor any rates or charges for sewer service, and in passing and adopting the ordinance alleged and set up in this suit, defendant alleges it did so on the application of The Sanitary Sewer Company, of Philadelphia, and it further did so to procure sewerage and sewer system for the defendant city and inhabitants, and it had the power under its municipal charter and under the laws of Alabama to do so, and defendant avers and alleges that it was not endeavoring to, nor did it, regulate the rates or charges for sewer service, but the reference to charges in [fol. 36] *in* section 6 of the ordinance was and is simply a maximum charge, leaving the plaintiff to regulate its rates of service not in excess of the maxima therein stated. Defendant alleges that the representatives of The Sanitary Sewer Company, of Philadelphia, suggested the maxima charges for services mentioned in the scehdule in section 6 of the said ordinance. Defendant further alleges that in embracing in the ordinance maxima charges for sewer service, it was not exercising its governmental or legislative, but was using and exercising its proprietary powers. And this defendant avers that section 6 of the said ordinance, with respect to the schedule of rates therein, is one of the conditions and requirements set forth in said ordinance agreed to be performed by The Sanitary Sewer Company, of Philadelphia, and inducing the defendant to adopt said ordinance, and was valid and binding upon the Sanitary Sewer Company of Philadelphia, and upon the plaintiff an assignee thereof. And in passing and adopting said ordinance with respect to the specifications of maxima charges for service, the defendant was well within the law applicable to such matters.

Defendant further answering said section 6 of the bill, denies that the charges specified in the ordinance are, or that they will be, if continued, become confiscatory of plaintiff's property, and demands

proof of the allegation in that respect. Further answering section 6 of the bill, the defendant alleges that after accepting said ordinance and after constructing its system of sewerage, the plaintiff entered into private contract with some of the residents of Opelika whereby plaintiff agreed and contracted to supply them with sewer service at a lower rate than that specified in the schedule in section 6 of the ordinance, and plaintiff *and plaintiff* under said contract is still supplying sewerage to such residents at said lesser rates or charges. Wherefore this defendant again alleges the charges agreed to in the schedule as specified in the ordinance, are reasonable and not confiscatory, considered in comparison with the investment of [fol. 37] the plaintiff and the services rendered to the public.

Further answering section 6 of the bill, defendant admits plaintiff filed an*d* application before defendant's Council as alleged in said section, and admits Exhibit B to the bill is a substantial copy of said application; but defendant denies that plaintiff was not getting sufficient revenue for the service it was giving to the public and its patrons.

Defendant further answering said section 6 of the bill, that is the last paragraph thereof, admits that said petition was presented to its Council and admits that Council did not have any controversy with plaintiff, but defendant avers that the facts in said application were not admitted, nor inquired into by either side. Defendant alleges that standing upon the conditions and requirements embraced in the ordinance and which are obligatory upon the defendant and plaintiff, defendant did not grant plaintiff any relief on said application, and *and* this defendant alleges that it had no power or authority to grant the plaintiff any relief. Further answering said paragraph of said section 6, defendant admits that plaintiff promulgated for its service from and after anuary 1, 1922, the rates specified in the application referred to, but defendant denies that said rates were just, fair and reasonable; and the defendant denies that the enforcement of said rates is necessary to afford plaintiff fair return upon the value of the property employed in plaintiff's sewer system. Defendant admits that plaintiff gave notice by publication and by mail, as alleged in said section 6, advising that the rates above referred to would be charged for the service rendered and the payment thereof enforced, and admits that Exhibit C to the bill in this case is a substantial copy of said notice.

7. This defendant answering section 7 of the bill says that it does not know that the only practical way for plaintiff to enforce payment of its new rates as promulgated and prescribed by it is to discontinue the service upon the *upon the* refusal or failure [fol. 38] of the customer to pay the rate prescribed, but this defendant further answering, denies the right or authority of the plaintiff to discontinue its service to it- said patrons. Further answering said section of the bill, defendant admits that the Mayor of the defendant, after the publication by the plaintiff of the notice hereinabove referred to, did cause a notice to be published in the papers as alleged in said section, and defendant here avers that while the Mayor was not advised to make such a publication, yet he was well within the law

in doing so, and well within the rights of this defendant to require plaintiff to conform to its charges for service mentioned and specified in section 6 of the ordinance referred to and made a part of the bill in this case. In respect to the expression in said section alleged to have been used by the Mayor, this defendant neither admits nor denies it, but it alleges that it is immaterial, and avers that was a personal matter of the Mayor's. Defendant further answering said section admits that after the new schedule of charges was promulgated by plaintiff, some of plaintiff's customers did not pay their bills for the quarter beginning annary 1, and ending March 31, 1922, and admits that such bills had been payable in advance. With respect to how many of such customers of the plaintiff have rendered the old rates, this defendant is not advised, and it denies the allegations of the bill in that respect, and demands the proof. Further answering said section, this defendant says that it does not know what actuated plaintiff's customers in not paying the new rate, whether it was on account of the publication and opposition of the Mayor, or whether it was because of the feeling on the part of the customers that such new rates promulgated were unjust and unauthorized, and this defendant demands the proof in that respect of the plaintiff.

Further answering the said section of the bill, defendant admits [fol. 39] that the Mayor and the Council would have exerted the power possessed by them to prevent the enforcement of the said new rates as it was advised it had the right to do so, and would have done, but for the granting of the injunction in this case. And here this defendant avers and alleges that it would have been well within its rights and authority under the law to have prevented the carrying into effect such new rates, but since the granting of the temporary injunction in this case, the Mayor and Councilmen in obedience of that mandate of the Court, will not undertake any steps, but will leave the matter to be determined in its finality by this Court. Defendant further answering suggests and avers that it is probable that the plaintiff by reason of the new rates promulgated by it will lose some of its customers by the voluntary action of such customers induced by the feeling on their part that the new rates are unjust and unreasonable, as said rates are increased one hundred per cent, and which this defendant alleges are unjust and unreasonable, when considered in proportion to the value of the investment of the plaintiff and the service rendered.

Further answering said section of the bill, this defendant admits that before the issurance of the temporary injunction if the plaintiff had undertaken to shut off and discontinue its service to any of its customers, the defendant would within the provisions of the law to such means as would have stopped plaintiff from cutting off or discontinuing its customers from the sewer service. And defendant further admits that it might have been probable that suit would have been brought against plaintiff if it had undertaken to shut off its customers, or to dig up the sewer connection in the streets and alleys of the defendant. But these matters are now in abeyance

for and on account of the granting of the temporary injunction but upon the final ending of this case the rights of the customers and of the city may be reestablished and adjudged by this Court [fol. 40] as this defendant here again denies the reasonableness of the rates promulgated by the plaintiff and insists and alleges that they should not be established by this Court, and this defendant further denies that the Court has any right, power or authority to make rates for the plaintiff or to approve any that it, the said plaintiff, has or may put in force or attempt to put in force. The defendant further admits that it is a penal offense for the plaintiff to dig up the streets or sidewalks of this defendant and it still denies that the plaintiff has any right or authority to dig up such streets. Further answering said section, defendant admits that the police department would have been instructed to institute prosecution against the plaintiff, its servants, agents and employees, if they had dug up, or attempted to dig up the streets of the city for the purpose of shutting off or discontinuing plaintiff's service to its customers, as defendant alleges it believed, and still believes that it would have been well within the right of the defendant under the law to prosecute such parties.

Defendant further answering said section 7, that is next to the last paragraph thereof, admits the allegations of the same down to and including the word "corporation" where it last occurs in said paragraph, just before "etc." Further answering said paragraph of said section, defendant alleges that it did have the right to proceed under the ordinance act, and avers that the plaintiff did incur liability under said ordinance, but this defendant denies that the plaintiff would have been put to any great embarrassment in financing its operation if the defendant had proceeded against plaintiff as alleged and intimated in said paragraph.

Answering the last paragraph of section 7, defendant admits that it would have exercised all its rights and powers to have prevented enforcement by plaintiff of the new rates, but it has now been enjoined and will await the final determination of the issues. This [fol. 41] defendant further answering said paragraph dnies that the operation of the plaintiff's property would have been impractical and unremunerative, and denies that interference on the part of the defendant to prevent the plaintiff from abandoning its contract would have amounted to confiscation of plaintiff's property.

8. This defendant answering section 8 of the bill of complaint, denies each and every allegation contained therein.

And defendant further answering section 8 of the bill of complaint, alleges and avers that the charges for sewer service as embodied in the ordinance franchise granted to the Sanitary Sewer Company, the assignor of the plaintiff, were suggested by the said Sanitary Sewer Company, and upon said suggestion the defendant and said Sanitary Sewer Company finally agreed upon said schedule of charges as the same appear in the Sixth Section of the ordinance, a copy of which is attached as an exhibit to and made a part of the plaintiff's bill of complaint in this cause.

Defendant further answering section 8 of the bill of complaint avers that by section Twelfth of the same ordinance and in compliance therewith, the said Sanitary Sewer Company plaintiff's assignor, filed its written acceptance of the ordinance which acceptance is set out in defendant's answer to section 3 of the bill in this cause and defendant avers that thereupon the ordinance became the contract between the assignor of the plaintiff and the defendant, and by section thirteenth of the said ordinance the plaintiff in this case succeeded the Sanitary Sewer Company, as to all rights, franchises, privileges and contractual rights granted by virtue of the ordinance, and became subject to all the obligations, liabilities, conditions and disabilities therein imposed.

Defendant further answering section 8 of the ordinance avers and alleges that said ordinance with respect to the sewer charges is a valid contract between the plaintiff and *and* this defendant and [fol. 42] if the prayer of the bill in this *in this* cause should be granted the obligations of said contract would be impaired, and would be violative of Section 10 of Article 1 of the Constitution of the United States.

9. Further answering the bill of complaint in this cause, this defendant alleges that the facts set forth in said bill are insufficient to constitute a valid cause of action in equity.

10. Further answering the bill, this defendant alleges and says that on its face the bill shows no rates for supplying sewer service by the plaintiff were fixed or attempted to be fixed by the defendant, nor did this defendant, undertake to regulate the rates to be charged by the plaintiff for sewer service. The defendant further avers that when the ordinance by which the plaintiff secured its franchise and right to install sewerage system in Opelika was adopted, this defendant was without any sewers or sewerage system, and as a matter of course was without any rates or fixed charges for sewer service; defendant alleges that said ordinance was adopted by the defendant city in the exercise of the city's business or proprietary power and for the purpose on the part of the defendant of securing and getting established a sewerage system in the defendant city, and sewer service for the defendant, and its inhabitants, and that amongst the conditions and terms set out in said ordinance, were these; that the plaintiff's assignor, its successors and assigns, should for sewer service charge not exceeding certain maxima rates specified in section 6 of said ordinance, and that the ordinance privileges and maxima rates should extend over a period of thirty years. And defendant avers at that time it was and still is a city of less than 6,000 inhabitants, and under and by virtue of section 228 of the Constitution of Alabama, which section is elsewhere set out in this answer, this defendant was authorized and empowered to grant the franchise and privilege to the plaintiff for a period of any number of years, and at any rate for a period of years not longer than thirty. [fol. 43] And defendant also alleges it had the power under its charter to contract with the plaintiff for maxima rates for sewer service, and the plaintiff accepted the ordinance and all the privileges therein

contained, together with the conditions and terms therein expressed, and proceeded to construct and did construct its said sewer system in defendant city, under said ordinance, and has supplied the defendant and its inhabitants sewerage service under the terms and conditions contained in said ordinance for a continuous period of nearly nineteen years next before the filing of the bill in this case. And this defendant alleges that the plaintiff has no right or equity to set aside or have this Court set aside the obligations resting upon plaintiff under said ordinance, or to have the Court to relieve it from the performance of the conditions and requirements assumed by it in the acceptance of the ordinance and the franchises therein granted.

And this defendant further answering especially denies that this Court has any jurisdiction or that the plaintiff has any right to invoke the jurisdiction of this Court to enable the plaintiff to set out or put into operation rates arbitrarily made by the plaintiff, as it is shown by the bill in this case the company has done.

11. For further and special answer to the bill this defendant hereby adopts as a part of this paragraph, paragraph 10 above, and further alleges that the adoption and passage of the ordinance by the City of Opelika under which the plaintiff installed its sewer system in the City of Opelika, in 1904, was adopted and granted, with all rights and privileges contained therein by and at the request of The Sanitary Sewer Company, of Philadelphia, Penn., and said ordinance and all the privileges and grants therein contained was duly assigned to the plaintiff in this case, and the plaintiff installed and is operating the said sewer system, and it took the said ordinance with all its benefits, burden, requirements and conditions, and oper- [fol. 44] ated the sewer system under the maximum schedule of charges contained in the said ordinance from the installation of the sewer system in 1904 to the 1st day of January, 1922; and this defendant now alleges and says, in answer to the bill of complaint, that the plaintiff is precluded from raising the question of the power of the city to adopt said ordinance and to agree to the maximum schedule of charges therein contained; and the said plaintiff is precluded from raising the question of ultra vires on the part of the City to grant the rights and privileges contained in said ordinance, and to fix the conditions and requirements therein contained. And this defendant further alleges that for reason herein above stated, the plaintiff should not have and maintain this suit against this defendant, and upon the denials in this answer, and the facts stated herein, the bill of complaint should be dismissed.

12. Further answering the bill this defendant alleges that the City of Opelika had no sewers or sewerage system at the time The Sanitary Sewer Company, of Philadelphia, assignor of the plaintiff, procured by the ordinance made a part of the bill of complaint in this cause, the franchise rights and privilege to install the sewer system upon the conditions and under the requirements named in said franchise contract, one of which conditions was that, that the charge for sewer service would not exceed the amount specified in section

6 of the said ordinance; and plaintiff, as assignee of The Sanitary Sewer Company, of Philadelphia, installed the sewer system in the City of Opelika, and has been operating and receiving its specified charges for services under said ordinance contract from the time of the installation of the system in 1904, to December, 1921, without any complaint with respect to the charge for service being too low or confiscatory; wherefore this defendant alleges that the plaintiff has been guilty of such laches as bars it from maintaining this suit.

13. This defendant further answering the bill of complaint alleges that under the charter granted to it by the Legislature of the [fol. 45] State of Alabama, if it had the power and authority to contract for the installation and operation of a sewer system in the City of Opelika and to specify conditions and requirements to be complied with by the person or company with whom such contract might be made, and to contract for maximum charges for sewer service. And under the Constitution of the State of Alabama, this defendant had the right and power to authorize the defendant and its assignor to construct and operate a sewer system in the streets, avenues and alleys and public places in the defendant city, and to agree with the contractee upon a schedule of maximum charges for service to be rendered by such contractee and defendant further alleges that under the constitution of Alabama it had the power and authority, not being a city of over 6,000 inhabitants, to grant the use of its streets, avenues and alleys for sewer purposes to any corporation for a period of thirty years, and to make as a condition of such grant that the grantee should not charge more than maximum charges fixed in the ordinance carrying the grant, and in this case defendant alleges that maximum charges were *upon* between the defendant and the assignor of the plaintiff as scheduled in section 6 of the ordinance made a part of the bill of this case, and this defendant alleges that said requirement and conditions contained in said ordinance with respect to maximum charges is valid and should be held in full force and effect.

And this defendant having fully answered the bill of complaint in all particulars, as it has been advised by its counsel is necessary and required, now asks this Court that the decree be entered in its favor dismissing the bill of complaint with cost decree upon the plaintiff, and dissolving the injunction.

N. D. Denson, of N. D. Denson & Sons; N. D. Denson & Sons, Dickinson & Dickinson, Solicitors for the Defendant.

[File endorsement omitted.]

[fol. 46] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION, AT OPELIKA

In Equity

[Title omitted]

AMENDMENT TO ANSWER—Filed May 22, 1922

Comes now the defendant and by leave of the Court for this purpose first had and obtained, amends the answer to the bill of complaint, in the following particulars:

Defendant amends its answer to section 3 of the bill of complaint by striking out section 3 of the answer as it now is, and substituting therefor as defendant's answer to section 3 of the bill the following:

3. Defendant admits the allegations contained in section 3 of the bill, and further answering said section defendant alleges and says that in pursuance of the twelfth section of the ordinance alleged in section 3 of the bill, and which is made an exhibit to the bill The Sanitary Sewer Company, plaintiff's assignor, did within thirty days from the first day of December, 1901, file with the Clerk of the District of Opelika, its written — of said ordiance, under its corporate seal, which said acceptance is in words and figures, substantially as follows:

"The Sanitary Sewer Company

Contractors & Engineers

December 26, 1901.

To the Mayor and Board of Aldermen of the District of Opelika Opelika, Alabama.

GENTLEMEN:

We hereby accept the franchise passed in our favor November 7th 1901, and the amendments thereto, passed November 19th, 190 and hereby agree to all the conditions contained therein.

Respectfully, The Sanitary Sewer Company, By J. F. Lewi President. John H. Cromie, Jr., Secretary. (Seal.)

[fol. 47] And defendant further answering, alleges that the plaintiff has, by virtue of its position as assignee of The Sanitary Sewer Company, of Philadelphia, with respect to said ordinance, assumed all the obligations, conditions, and requirements imposed by said ordinance upon The Sanitary Sewer Company, and has accepted all the conditions contained in said ordinance, and plaintiff is under legal obligations to conform and comply with all the conditions and requirements imposed upon the said The Sanitary Sewer Company by said ordinance. And defendant further answering, avers that

said ordinance, and the acceptance thereof, as hereinabove set out, by The Sanitary Sewer Company constituted a contract between said The Sanitary Sewer Company and the defendant; and defendant further avers that by becoming assignee of the said ordinance, the said ordinance is a contract between the plaintiff and defendant and, as hereinabove averred, the plaintiff and defendant are bound by said ordinance.

N. D. Denson, Of Counsel for Defendant; Dickinson & Dickinson, N. D. Denson & Sons, Attorneys for Defendant.

To Steiner, Crum & Weil and Barnes & Walker, attorneys of record for the plaintiff in the above-styled cause:

You will take notice that on Monday, the 22nd day of May, 1922, the City of Opelika, the defendant in said cause, will ask leave of the Court to file the above and foregoing amendment to its answer to the bill of complaint.

N. D. Denson & Sons, Dickinson & Dickinson, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 48] UNITED STATES OF AMERICA:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

WRIT OF INJUNCTION—Filed April 5, 1922

To the City of Opelika, Alabama, its officers, agents and employees:

The Opelika Sewer Company having filed its bill of complaint in this Court against the City of Opelika, and having obtained from the Honorable Henry D. Clayton, Judge of said Court, an order for the issuance of an injunction pendente lite to enjoin you as hereinafter mentioned; and the said Opelika Sewer Company having in accordance with said order entered into bond with surety in the sum of $5,000.00, payable to the City of Opelika, as required by said order, and which bond has been approved by me;

Now, therefore, you, the said City of Opelika, your officers, agents and employees, be and hereby are enjoined from taking any action, civil or criminal, in any other Court or tribunal to compel the plaintiff to maintain the rates for its service set forth in the amended ordinance of April, 1902, made an exhibit to the bill of complaint in said Court, and from in any manner proceeding against the plaintiff, the Opelika Sewer Company, to prevent the enforcement by it under its reasonable rules and regulations the rates prescribed by it and set forth in Exhibit "B" to the bill in this cause; and this

injunction you are required to obey under the penalty of the la
until the further order of said Court.

Witness my hand and the seal of said Court this the 5 day
April, A. D. 1922.

George Stuart, Clerk U. S. District Court, Middle Distri
of Alabama. (Seal.)

[fol. 48½] Received in office April 5th, 1922.

McDuffie Cain, United States Marsh

Executed by serving a copy of the within writ on the City
Opelika, Alabama, by handing the copy to Dr. J. G. Palmer as May
of the City of Opelika, Alabama, and at the same time showing hi
the original with the seal of the Court thereon. This the 7th day
April, A. D. 1922.

McDuffie Cain, United States Marshal, By W. L. Duff
Deputy.

[File endorsement omitted.]

[fol. 49] In the District Court of the United States for t
Eastern Division of the Middle District of Alabama

[Title omitted]

Order Appointing Special Master—Filed July 22, 1922

Now come the parties, and it being made to appear to the Court t
this is a proper case for the appointment of a Special Master; it
therefore now considered, ordered, adjudged, and decreed that Hon
Stringfellow, Esquire, be and hereby is appointed Special Master
whom the above entitled cause is referred, with respect to the iss
of fact in the case.

Said Master is hereby authorized, empowered and directed to ta
such evidence as may be offered by either of the parties upon t
several issues of fact involved therein, and to report his findings
fact thereon to the Court as early as practicable, together with
transcript of the evidence, for such further decree as the Court m
deem proper.

Said Master is authorized to employ a competent stenographer
reasonable compensation to take down and transcribe said testimo
the reasonable cost and expense therefor to be taxed as costs on
final disposition of the cause. The Special Master will fix reas
able time and place or places for the taking of the testimony, giv
the parties or their attorneys reasonable notice thereof, and may
such reasonable rates with reference to the manner of taking s
testimony as he may deem proper.

Said Master may apply to the Court for instructions from time to time as he may deem necessary.

Done this 20 day of July, 1922.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 50] In the District Court of the United States for the Eastern Division of the Middle District of Alabama

[Title omitted]

Motion to Dissolve Writ of Injunction—Filed May 4, 1923

Comes now the defendant and by leave of the Court for this purpose had and obtained now and again moves the Court to dissolve the writ of injunction in this case formerly granted by the Court and assigns these grounds in addition to the other grounds heretofore assigned for the motion:

1. There is no equitable cause of action shown in this case.

2. It is shown in this case that the charges for sewer service were agreed upon by the plaintiff and the defendant by contract which is valid as between the parties.

3. The contract between the plaintiff and defendant with respect to sewer charges exists by virtue of the franchise contract which was entered into by and through the proprietary powers of the defendant and by the voluntary assent thereto by the defendant.

Dickinson & Dickinson, N. D. Denson & Sons, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 50½] In the District Court of the United States for the Middle District of Alabama, E. Div., at Opelika

[Title omitted]

Order Setting Cause for Hearing—Filed April 10, 1923

In open Court and by agreement had between the parties to this cause, it is ordered by the court that the above stated cause be and hereby is set down for hearing and trial at Montgomery, Ala. on May 4, 1923.

Done this April 10, 1923.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 51] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

IN EQUITY

[Title omitted]

REPORT OF SPECIAL MASTER—Filed Feb. 26, 1923

To the Honorable Henry D. Clayton, Judge of said Court:

In pursuance of the decree of this Honorable Court, made and entered on the 22 day of July, 1922, in the above entitled cause, I, Horace Stringfellow, the Special Master appointed by said decree "to take such evidence as may be offered by either of the parties, upon the several issues of fact involved therein and to report his findings thereon to the Court as early as practicable together with a transcript of the evidence," having been attended at the time and place agreed upon by the parties, by counsel for complainant and the defendant, and having taken such evidence as was offered by either of the parties, upon the said several issues of fact, and having heard arguments of counsel for the parties, and duly considered said evidence, do report:

1. That the Sanitary Sewer Company transferred to the Opelika Sewer Company all of the rights, privileges and franchises granted to the Sanitary Sewer Company by the District of Opelika by ordinance passed on the 7th day of November, 1901 as amended in consideration of 495 shares of the capital stock of the Opelika Sewer Company issued to the Sanitary Sewer Company, and one share each to five persons, making five hundred shares of the capital stock of [fol. 52] the Opelika Sewer Company, of an authorized capital of $75,000.00 and being all of the capital stock outstanding.

2. That the Sanitary Sewer Company thus controlling the management of the Opelika Sewer Company on the 14th day of February 1902 entered into a contract with the Opelika Sewer — by which the Sanitary Sewer Company agreed to build the sewer system called for by said ordinance for $50,000.00 of its issue of bonds, with 5% coupons attached secured by mor-gage; the contract providing further that the chief engineer might include in his certificate any other expenditures by the Sanitary Sewer Company for accounts of the Opelika Sewer Company *for accounts of the Opelika Sewer Company* such as legal and other fees, printing of bonds and stocks, and any and all payments made by the Sanitary Sewer Company that may be made in connection with the promotion and construction of said sewer plant, vouche-s for which shall be furnished by the Treasurer of the Sanitary Sewer Company to the said engineer, and by him filed with his report. That on the 3rd day of December 1902 the chief engineer certified that the Sanitary Sewer Company was entitled to $20,000.00 additional bonds of the Opelika Sewer Company for house connections, additional territory sewered not contemplate

in the original plan, and the erection of a Disposal Plant, which was not in the original contract. It is held in the case of Knoxville vs. Knoxville Water Company, 53 Law Ed. U. S. Rep. 371, that bonds issued under such conditions afford neither measure nor guide to the valuation of the property.

3. That the gross receipt of the Opelika Sewer Company from the operation of its sewerage system from January 1904 to December 1920 was the sum of $59,834.16, and that its total operating expenses for such period was the sum of $42,588.36; and that its profits in excess of its expenses for said period was the sum of $17,245.80. That its gross operating receipts during the year 1921 was the sum of $5,330.31, and that its operating expenses for said year was the sum [fol. 53] of $2,939.26, giving a net operating profit for said year of the sum of $2,391.05. That the gross receipts of the Opelika Sewer Company under the rates promulgated by it, will be about double the amounts of its gross receipts for the year 1921 under the rates prescribed by the ordinance. That the sewer system of the Opelika Sewer Company has been economically managed.

4. That the sewer system and disposal plant of the Opelika Sewer Company was constructed by Wm. McLean, and he was paid therefor the sum of $47,011.89, the final payments for the sewer system being made to him November 19th, 1902, and the final payment for the disposal plant essential there to being made to him on the 13th day of February, 1903. That the sum stated was exclusive of engineers' salaries shown by him to have been employed on the work, and of all other expense except the cost of actual construction of the work above stated.

5. That no evidence as to the present value of the property of the Opelika Sewer Company devoted to the public use, was offered by either of the parties except as to the cost of reproduction, both the complainant and the defendant offering evidence as to such cost, such testimony as to cost of reproduction of the sewer system proper, and of the disposal plant, exclusive of expenses of engineers, attorneys fees, financing, etc. being as follows: Wm. McLean sewer system proper $74,732.95, disposal plant $8,268.60, aggregate value $83,001.55 Robert A. Jones sewer system proper $64,446.19, disposal plant $8,229.50, aggregate value $72,715.16, disposal plant $9,569.00, aggregate value $83,704.16, the foregoing being witnesses for the complainant: Dan Dull, witness for defendant, sewer system proper $65,993.75, disposal plant $4,000.00, aggregating $69,993.75. The witness for the complainant further testified that the cost of taking up and replacing paving in the reproduction of said sewer system proper would be as follows: Wm. McLean $25,830.00, Robert Jones [fol. 54] $25,787.00, Stuart Washburn $24,855.80. There is, however, no evidence that there was any paving taken up and replaced in the construction of the sewer system of complainant. I am of the opinion therefore that the cost of taking up and replacing paving should not be included in an estate of the present value of the

property of complainant devoted to the public use and exclude the same from my consideration of such value.

Mr. Dull witness for the defendant testified that he had designed and made tracing of a new sewer system for the City of Opelika which he testified could be constructed at a cost of $53,816.50. His testimony shows however that this lower cost is due to radical differences from the plan of the sewer system of the complainant which was approved by the City of Opelika, the value of which sewer system is under consideration, and I am of the opinion that the fact that another sewer system constructed upon a different plan could be constructed for less money can have no effect upon the value of the property of the complainant devoted to the public use.

6. The testimony of Mr. Dull witness for the defendant as to the cost of reproducing the sewer system proper from an actual survey thereof, is $1,547.56 more than the estimate of Mr. Robert Jones for the same work, but his estimate as to the cost of reproducing the disposal plant is $379.69 less than the amount paid Mr. McLean for the construction of the disposal plant in 1902. Mr. Dull testified that it would cost more now to construct the disposal plant than in 1902. He further testified that the price of the disposal plant "was worked out in the office from figures we had." It is clear therefore that the estimate of Mr. Dull that it would cost only $4,000.00 to reproduce the disposal plant cannot be accepted as correct. How far the mistake effected his estimate cannot even be conjectured. The testimony of Mr. Jones shows that he was not only an engineer, but was also a general contractor engaged in business in this section, with recent experience in the construction of sanitary sewer systems [fol. 55] therein; that his estimates were made upon a competitive basis, upon the data as to qualities, etc. of the original construction furnished to him by Mr. McLean. The estimate of Mr. Jones was made in July 1922, but he testified that prices were slightly higher January 1st, 1922, and in this he is confirmed in part by the testimony of witness for defendant. His estimate as to the cost of the reproduction of the sewer system proper is lower than the estimate of Mr. Dull, the witness for defendant of which he could have no knowledge, and I think can be taken as a fair and reasonable estimate of such cost, and I can see no reason for not accepting his estimate of the cost of reproducing the disposal plant as fair and reasonable also. I therefore find the cost of reproducing the sewer system proper and the disposal plant of the Opelika Sewer Company exclusive of engineers' salaries, attorneys, fees, or other overhead expenses, and exclusive of any additions or betterment to said plant to be the sum of $72,715.69, the aggregate estimate of Mr. Robert A. Jones.

The cost of reproduction less any depreciation or deterioration is recognized by the Supreme Court of the United States as a proper method for ascertaining the value of property of public utility or service corporation, devoted to the public use, and it seems to me to be the most satisfactory method for such purpose.

7. The estimate of Mr. Robert Jones upon cost of reproduction accepted as reasonable and proper herein was based upon the estimate

of the original cost of the sewer system given him by the contractor constructing it. His estimate therefore did not include cost of reproducing betterments added sub-quently to the system. These betterments are shown by the testimony to have amounted to the sum of $959.97 which is added to the cost of reproduction above stated, making the sum of $73,675.66.

8. In addition to the cost of reproduction of the sewer system of the complainant above stated, there are other expenses which would [fol. 56] be incurred in the construction of such system. The testimony shows that an engineer would have been employed to make a full and complete survey, getting the elevation of each and every street corner, taking them and plotting up the profiles, and from those laying out the different pipes with the proper gradients and man-holes, and make an estimate of the number of feet and the man-holes to submit to the contractor; that a resident engineer would be required with assistants to inspect the work done by each gang to see that it was properly done. Further more it is a matter of common knowledge that works of this kind are financed in part by the execution of bonds secured by mortgage or deed of trust upon the property, which would have to be executed, requiring attorneys, and the expense of their compensation. Such expenses are regarded as proper items in consideration of the reproduction cost. Mr. Washburn testified that the usual and ordinary cost and expenses in work of this kind with reference to the expense of engineering work, drawing plans and specifications and superintending the work, etc. was from 7% to 10%, Wm. McLean about 10%, Mr. Robert Jones 10%, and Mr. Dull testified that engineering expenses ran from 5% to 7% or 7½% possibly, and that 10% was the general expense, including attorneys' fees and bonds. Considering the engineering services and supervision that would be required in the reproduction of the sewer system, I am of the opinion and find that 10% of the cost of reproduction of the sewer system proper, and of the disposal plant above found, namely $7,367.00, would be a reasonable allowance for the above additional expenses, making the cost of reproduction as above stated $81,042.66.

9. Interest on investment during construction, allowing for fact that all the money is not invested at one time, is properly allowable [fol. 57] as part of the cost of construction. The testimony shows that the construction of the sewer system of the Opelika Sewer Company including disposal plant was completed in about eight months, and the only testimony as to proper rate of interest upon cost during construction is five per cent. I therefore allow and report the sum of $2,026.00 being six months interest per annum upon the cost of reproduction above stated as a reasonable sum to be added to such cost of reproduction for loss of interest on investment during construction, making such cost of reproduction the sum of $83,068.66.

10. As is said in the case of Des Moines Gas Co. vs. Des Moines, 238 U. S. 153, "That there is an element of value in an assembled and established plant doing business and earning money over one

not thus advanced is self evident. This element of value is proper
right, and should be considered in determining the value of the
property upon which the owner has the right to make a fair return
when the same is privately owned although dedicated to public use.
Each case must be controlled by its own circumstances." It is
a matter of common knowledge that prior to the installation of a
sanitary sewer system in a city or town its people have other methods
of disposing of its sewerage, so that the business of a sanitary sewer
system is one of gradual growth and losses incurred during the first
years of the institution of such system may be properly regarded as
incidental thereto, particularly in the absence of sanitary legislation
of which there is no evidence. The testimony here shows that the
gross receipts, and operating expenses of the Opelika Sewer Com-
pany for its first seven years of its operation were as follows: for
1904, receipts $1,407.67, operating expenses $2,580.45; for 1905
receipts $1,707.56, operating expenses $2,537.30; 1906 receipts $1,
981.52, operating expenses $1,911.21; 1907 receipts $2,125.
operating expenses $2,754.40; 1908 receipts $2,277.65 operating ex-
[fol. 58] penses $1,807.29; 1909 receipts $2,671.44, operating ex-
penses $1,961.38; 1910 receipts $2,827.52, operating expenses $2,
938.45. In the year 1904 there was an operating loss of $1,172.8
in the year 1905 an operating loss of $829.74; in the year 1906 an
operating profit of $149.45; in the year 1907 an operating loss of
$628.24; in the year 1908 an operating profit of $514.00; in the year
1909 an operating profit of $725.13, and in the year 1910 an operat-
ing profit of $908.32, and in the year 1911 an operating profit of
$1,296.77. The evidence shows that the property of the Opelika
Sewer Company has been economically managed, and that the losses
above shown were not made good in subsequent years. I am of the
opinion that the first five years at least during which time there was
a net operating loss of $2,080.67 of the business of the Opelika Sewer
Company should be considered as its "experimental stage", and that
its losses during such period consisting of out of pocket cost and loss
of revenue as incidental to such business to be included as "going
value" in determining the value of its property devoted to public
use; that such losses during such period at a revenue of five percent
(its bond rate) upon the contractors' cost of construction of its system
plus the overhead charges of the character above stated amounts to
the sum of $15,330.00, which sum I find to be the going value of the
said property, to be included in the value of its property devoted to
public use, making such values above ascertained the sum of $8,
398.36.

11. There was testimony that the Opelika Sewer Co. owned an
acre of ground for its disposal plant, and also rights of way, but there
was no evidence of the value of such property.

12. There is no testimony of any deterioration of the property of
the Opelika Sewer Company except as to the disposal plant. Mr.
McLean witness for the complainant testified that he had inspected
the property of complainant except the pipes, and thought it all in
[fol. 59] good condition as when it was built, that he found it

deterioration; that all of the property was underground except the manhole tops and *and* the disposal plant; that all the pipes except 296 feet of iron pipe was vitrified terra cotta pipe, which would not deteriorate; that the manhole tops might break under a heavy load, which could be repaired by getting new tops, and the testimony of Mr. Morgan shows that he made such repairs in January 1921. Mr. Dull, witness for defendant, testified that he had made an inspection of the entire plant "in the last four or five months" and he testified to no deterioration or bad condition except as to the disposal plant. It is however a matter of common knowledge that cast iron pipes will deteriorate when under ground. The cast iron or iron pipe as estimated by Mr. Robert Jones (whose estimate of the cost of reconstruction has been accepted by me) as to the value of $756.00. The testimony shows that the cost of such pipe as paid to the contractor was $533.40, and I deduct the difference of $222.50 between such original cost and the cost as testified to by Mr. Jones as and for the deterioration in such pipe. The evidence further shows that the disposal plant at an examination made by defendants witness about six months before the taking of the testimony herein was not functioning properly, attributed to the fact that the contract beds had become clogged for half their area. The testimony shows that the contact beds were periodically cleaned, and that they had been renewed by taking out the old slag in 1920. While this is a matter of repairs yet in determining the value of the disposal plant the cost of such cleaning shown to be $539.49 should be deducted as a deterioration, which is accordingly done, making with the sum of $222.60 deducted supra, the allowance for depreciation of the property of the complainant the sum of $762.09. Deducting this allowance for depreciation or deterioration from the sum of $98,398.65, the value of the property of the Opelika Sewer Company devoted to the public use, above found, there remains the sum of $97,641.57, [fol. 60] which sum I find and report to be the value of the property of the Opelika Sewer Company devoted to public use as of the 1st day of January, 1922.

13. The City of Opelika has the right under the general law to require the removal of the pipes, etc., of the Opelika Sewer Company from the streets of the city upon expiration of the life of the franchise, which is thirty years, and it is claimed by complainant that it is entitled to an allowance of an annual sum for the amortization in part of its plant to cover the loss of value that would be occasioned by such removal. Where there is a provision in an ordinance granting a franchise for the use of the streets of a city requiring removal of the property of a public utility company from its streets upon the expiration of the period for which the franchise is granted, it is held that the length of live of the plant is certain, and sufficient rates must be charged to permit the company to receive back the principal of its investment at the expiration of the period of its franchise. There is no provision in the ordinance granting the franchise under which the complainant is operating, requiring the removal of its pipes, etc., from the streets of the City of Opelika at the

expiration of its thirty years, as such period is a limitation provided by law upon the power of the City in the premises. There is however a possibility that such removal may be required, and it has been held that the mere possibility of such removal is sufficient to authorize such amortization, but if such amortization is allowed by reason of such possibility, and the franchise is renewed, the Opelika Sewer Company would be the owner of the plant, which had been in part paid for by the public. It is my opinion that the possibility of such removal based upon the mere existence of an abstract right to remove, is not sufficient to justify the possibility of such result and there is nothing in the evidence to show that such removal would be required.

[fol. 61] 14. The average operating profit of the Opelika Sewer Company during the entire time of its operation was $1,472.47 and its average operating profit during the last five years including 1921, during which period its receipts were at their peak, was $2,406.41. The evidence shows however that during the years 1921, 1920 and 1919 the Opelika Sewer Company had given reduced rates to a patron for which at such time it received no return in services and the evidence justifies the conclusion that had not such reduction not been given its receipts would have been $150.00 more per year. The sum of $450.00, four hundred and fifty dollars, therefore should be added to the average operating profits for the last five years, making the average operating profits for such period $2,856.41 instead of $2,406.41. The evidence further shows that such reduction is being continued under the rate promulgated by the Opelika Sewer Co. The average operating profits for the last five years as corrected yielded the Opelika Sewer Company a net return of not more than $50.00 above three per cent upon the value of its property devoted to the public use as above found. A less return would follow if based upon the operating profits of 1921 alone. My conclusion therefore is that the rates specified and contained in the ordinance of the District of Opelika as amended April 22nd, 1922 did not afford the Opelika Sewer Company just compensation for use of its property, and that they were and are confiscatory.

15. In the case of Knoxville vs. Knoxville Water Co., 212 U. S. 1-19 it is said "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing parts of the property when they come to the end of their life," so that at the end of any given term of years the original investment remains as it was at the beginning; that it is ot only right for the company to make such provisions but in case of a public [fol. 62] service corporation is "its plain duty to the public."

16. The evidence shows that the gross receipts of the Opelika Sewer Company under the rates promulgated by it will be about double the receipts for the year 1921, or the sum of $10,961.62. The evidence further shows that the sum of three thousand dollars per year has been sufficient to pay its operating expenses and to keep

its property in such repair that it was in as good a condition as when it was built except the expenditure of $2,939.26 for the repair of the disposal plant in 1920. The evidence further shows that the vitrified terra cotta pipe of the sewer system will need no replacement. I find therefore that the sum of $3,500.00 (three thousand, five hundred dollars) per year should and would be a sufficient allowance for the payment of the operating expenses of the Opelika Sewer Co., and all repairs and replacements to the property, leaving a probable annual operating profit of $7,461.62, from the rates promulgated by it.

17. It is said in the case of Lincoln Gas & Electric Company vs. City of Lincoln, 250 U. S., page 268: "It is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago, furnishes no safe criterion for the present or for the future." It is equally well known that rates of return increase with the hazard of the investment and while the possibility that the Opelika Sewer Company may be required to remove its pipes, etc., from the streets of the City of Opelika at the end of the thirty year period, to the destruction of a great part of the value of its property, does not authorize an allowance for the amortization of its plant, such hazard should enter into the rate of return allowed it for the use of its property.

[fol 63] 18. My conclusion is and I so find and report that a return of eight per cent upon the value of its property, devoted to the public use, would not be unfair or unreasonable. The probable annual operating profit of the Opelika Sewer Company from and under the rates promulgated by it, would not yield it such a return upon the value of its property devoted to public use, hereinabove found, and I therefore find and report that such rates are not unfair or unreasonable to the inhabitants of said City.

19. As directed by the decree of the Court, I return with this report the transcript of the evidence offered by the parties, including the testimony and exhibits thereto, in separate enclosure.

20. The defendant filed objections in writing under agreement of counsel, (filed herewith) to certain portions of the testimony and exhibits of Wm. McLean, Robert Jones and Stuart Washburn. The objections to testimony and exhibits of Robert Jones are each overruled. The objections to testimony and exhibits of the other witnesses named are not passed upon, for the reason that such portions of the testimony are not made the basis of this report.

Respectfully submitted, Horace Stringfellow, Special Master.

[File endorsement omitted.]

[fol. 64] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

[Title omitted]

DEFENDANT'S EXCEPTIONS TO MASTER'S REPORT—Filed Mar. 10, 1923

Now comes the defendant, City of Opelika, and excepts to the report of Horace Stringfellow, Esq., the Special Master, filed in this cause on the 26th day of February, 1923, and as grounds or causes of exception shows as follows:

1. The Master in ascertaining the value of the property of the plaintiff which is devoted to the public use, proceeded upon a wrong basis or method of valuing said property.

2. The Master in adopting the cost of production of the property of the plaintiff devoted to the public use and the cost of reproduction, as the method of ascertaining the value of the property of plaintiff, proceeded upon an erroneous basis and method as applicable in this case.

3. The Master in determining what just compensation would be for the plaintiff in this case for the use of its property devoted to the public use should have done so by ascertaining the revenue that such property is capable of producing.

4. The Master in his report, fixes too high a valuation on the property of the plaintiff devoted to sewer service.

[fol. 65] 5. The report of the Master shows that the investment made in the property devoted to sewer service by plaintiff did not exceed the sum of $67,011.89, and in ascertaining what would be a just compensation to the plaintiff for the use of its sewer system devoted to the public use, the Master fixes the valuation of the property at $81,042.26. (See Sections 3 and 4 of Report.)

6. The report of the Master is erroneous in fixing the valuation of the property of the Opelika Sewer Company devoted to public use at $97,641.57. (See Section 12 of the Report.)

7. The report of the Master is erroneous in that it requires the patrons of the plaintiff to pay an enhanced price for sewer service because it would now cost more, at the time the suit in this case was commenced, to construct a sewer system similar to that of the plaintiff which is now being used by the public.

8. The report of the Master shows by the method adopted by him in arriving at the original cost of the property, and what it would cost to reproduce same at the time of filing of this suit, that it will require the patrons of the sewer system to pay an enhanced price for the sewer service and that too, on the ground that it would now cost more to construct similar works, and this will allow the plaintiff to make a

profit, not as a reward for its expenditures and service, but for the fortuitous occurrence of the rise in prices of materials and labor.

9. The Master has made an accurate ascertainment of the amount of money actually invested by the plaintiff in its sewer system and fixes the amount at $70,000.00. (See Section 2 of the Report.) But, he fixes the value of the property as a basis for ascertaining just compensation to the plaintiff at the sum of $97,641.57.

10. The Master's report shows an expenditure by the plaintiff in [fol. 66] producing its sewer system of the sum, total $70,000.00, and at the same time in arriving at what would be just compensation to the plaintiff for the use of its property devoted to the public service, the Master fixes the value of the property at $97,641.57.

11. The report of the Master is erroneous in that it fixes the value of the property of the plaintiff devoted to sewer service at $98,398.36 and uses this valuation as the basis for calculation in ascertaining what would be just compensation to the plaintiff for the use of its property devoted to public service, and the report at the same time shows that the actual amount invested in the sewer system by the plaintiff did not exceed $70,000.00. (See Section 10 and 2 of the Report.)

12. The report shows that the method adopted by the Master in ascertaining the cost of reproduction of the sewer system of the plaintiff is wholly conjectural.

13. The valuation fixed by the Master in his report of the value of the property of the plaintiff devoted to sewer service at the time of the filing of this bill, is purely conjectural and without any reasonable foundation upon which to rest.

14. The method as shown by the report of the Master in ascertaining what would be just compensation to the plaintiff for sewer service, requires the patrons of the plaintiff to guarantee to the plaintiff that the sewer system would be a source of profit to the plaintiff.

15. The Master in arriving at the value of the property of the plaintiff devoted to sewer service, erroneously included estimates of charges for attorneys' fees, engineers and financing.

16. Engineers' fees are included in the Master's finding as constituting a part of the cost of reproduction of plaintiff's plant, and such [fol. 67] is an illegal charge.

17. The Master erroneously included as a part of the cost of reproduction of the plaintiff's sewer service the sum of $7,367.00 as additional expenses for engineering work, drawing plans and specifications and superintending the work and attorneys' fees. (See Section 8 of the Report.)

18. The Master in his report is in error in including as a part of the cost of reconstruction, interest on investment during construction. (See Section 9 of the Report.)

19. The Master erroneously included interest on investment during construction as a part of reproduction cost of plaintiff's plant, as the evidence does not show the money was invested nor does it show what sums, if any, were invested at any particular time.

20. The report of the Master erroneously included $2,026.00 as interest on investment and as a part of the cost of reproduction of plaintiff's plant. (See Section 9 of the Report.)

21. The Master erroneously included as a part of the value of the property devoted to public uses, the sum of $15,330.00 as going value of plaintiff's property devoted to public use. (See Sec. 10 of the Report.)

22. The Master in including the sum of $15,330.00 as going value of plaintiff's property devoted to public use is in error. (See Sec. 10 of the Report.)

23. The Master in including $15,330.00 as going value of the plaintiff's property devoted to public use, was without authority of law as applicable to this case.

24. The Master in including $15,330.00, as going value of the planitiff's property devoted to public use, was without any evidence upon which to base such finding.

[fol. 68] 25. The Master in including the item of $15,330.00, (See Sec. 10 of the Report) as "going value" requires the consumers to pay the losses sustained by the plaintiff in the operation of the sewer system.

26. The charge in the report of $15,330.00 as going value is based upon mere conjecture.

27. The Master proceeded upon a wrong theory in ascertaining what going value of the plaintiff's plant is.

28. The going value of plaintiff's plant as fixed by the Master in his report is excessive.

29. The value fixed by the Master in his report as going value of the plaintiff's sewer system is speculative.

30. The Master in his report uses inappropriate date in ascertaining the going value of the plaintiff's sewer system. (See Section 10 of the Report.)

31. The Master is in error in finding and reporting that the rates for sewer service promulgated by the plaintiff are fair and reasonable.

32. The Master is in error in his report, in overruling defendant's objections to the evidence of Robert Jones and to the evidence of Stuart Washburn. (See Sec. 20 of the Report.)

33. The Master does not in the report show any notice was taken by him of the acceptance in writing December 26th, 1901, by the Sanitary Sewer Company of the franchise.

34. The Master erred in overruling defendant's objections to evidence.

Dickinson & Dickinson, N. D. Denson & Sons, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 69] In the District Court of the United States for the Middle District of Alabama, Eastern Division

[Title omitted]

Amendment to Exceptions to Report—Filed April 9, 1923

Comes now the defendant in this cause and by leave of the Court for this purpose first had and obtained amends its exceptions heretofore filed to the Master's report on the 10th day of March, 1923, by adding thereto the following additional grounds of exception to be numbered as follows, to-wit:

35. The Master erred in his conclusion that "the rates specified and contained in the ordinance of the District of Opelika as amended April 2, 1902, * * * are confiscatory." See last sentence of Section 14 of the Report.

36. The Master erred in considering whether or not the rates complained of in the bill were confiscatory; and also erred in finding and reporting that the rates complained of in the bill of complaint are confiscatory.

Dickinson & Dickinson, N. D. Denson & Sons, Attorneys for Deft.

[File endorsement omitted.]

[fol. 70] In the District Court of the United States for the Eastern Division of the Middle District of Alabama

[Title omitted]

Final Decree—Filed June 27, 1923

This cause coming on to be heard, come the parties and submit the same on the motion of the defendant to dismiss the bill; the exceptions to the Special Master's report, and on pleadings and proof for final decree.

Now, upon consideration thereof, the cause having been fully argued, I am of the opinion that the motion to dismiss is not well taken; that the exceptions to the Master's report are not well taken, and that the plaintiff is entitled to the relief prayed for.

It is therefore considered, ordered, adjudged and decreed, (1) that the motion to dismiss the bill be, and the same is denied; (2) that the exceptions to the Master's report be and hereby are overruled and denied, and that the Master's report be and hereby is in all things approved and confirmed; (3) that the plaintiff is entitled to the relief prayed for, and that the injunction heretofore issued in this cause be and hereby is made perpetual.

The defendant will pay the cost of this proceeding for which execution may issue.

Done this 27th day of June, 1923.

H. D. Clayton, U. S. Judge

[File endorsement omitted.]

[fol. 71] IN THE UNITED STATES DISTRICT COURT, EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

In Equity

No. 16

[Title omitted]

PETITION FOR APPEAL—Filed July 24, 1923

To the Hon. Henry D. Clayton, District Judge:

The above named, defendant, City of Opelika, a municipal corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 27th day of June, 1923, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States under the rules of the courts and the statutes in such cases made and provided.

And the petitioner, (appellant) further, prays that the proper order relating to the bond to be required of it be made. This petition is accompanied by assignment of errors.

N. D. Denson, N. D. Denson & Sons, Dickinson & Dickinson,
J. J. Mayfield, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 72] IN THE UNITED STATES DISTRICT COURT, EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 24, 1923

On motion of N. D. Denson, Esqr. solicitor and counsel for the defendant, it is ordered that an appeal to the Supreme Court of the United States from decree heretofore filed and entered in this cause, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be in due time transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be and is fixed, at the sum of Two Thousand Dollars, said bond to be taken and considered as bond for cost and to supersede the decree of the District Court so far as the costs are concerned.

Dated this the 24 day of July, 1923.

Henry D. Clayton, Judge of the Middle District of Alabama.

[File endorsement omitted.]

[fol. 73] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

BOND ON APPEAL [For $2,000.00; Filed and Approved July 24, 1923; Clayton, J.; omitted in printing]

[fol. 74] IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 24, 1923

Comes now the defendant in the above entitled cause and files the following assignment of errors which it will rely and insist upon in its prosecution of the appeal in the above entitled cause, from the decree made by the United States District Court for the Eastern Division of the Middle District of Alabama, on the 27th day of June, 1923.

1. The District Court erred to the prejudice of the defendant, in overruling the defendant's motion to dismiss the bill of complaint filed in this cause for the following reasons:

(*a*) The bill alleged no sufficient facts to confer jurisdiction upon the District Court to hear or determine the controversy involved between the parties to the suit.

(*b*) Because the allegations of the bill failed to make a case of diverse citizenship, or a case arising under the Constitution or laws of the United States, or a case which involved a dispute or controversy as to the effect or construction of the Constitution or laws of the United States upon the determination of which the result of the suit depends.

(*c*) Because the bill of complaint fails to state any facts to present a suit which substantially and really involves a dispute or controversy between the parties to the suit as to any right which depends on the construction of the Constitution or any law or treaty of the United States or any other Federal question.

(*d*) Because all the allegations of the bill as to any Federal question involved are mere conclusions of the pleader, which conclusions of the pleader are not justified or supported by any facts alleged, [fol. 75] but to the contrary the facts alleged in the bill negative the conclusions of the pleader as to any Federal question *claimed* to be involved.

2. The District Court erred to the prejudice of this defendant in decreeing that any law of the Legislature *or* Alabama, or any ordinance of this defendant a municipal corporation of the State of Alabama, in respect to the defendant's charter, or of the ordinance franchise set forth in the bill had violated section 22 of the Constitution of Alabama which provides: "That no ex post facto law, nor any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities shall be passed by the legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment.

3. The District Court erred to the prejudice of the defendant in decreasing that the schedule of maximum charges for sewer service set forth in the ordinance franchise involved in this case was not procured and agreed upon by the assignor of the plaintiff and this defendant by contract.

4. The Court erred in decreeing that the schedule of maximum charges for sewer service set forth in the ordinance copy of which is attached as Exhibit A to the bill of complaint in this case, was a governmental or regulatory rate and not a contract fixed rate for sewer service between the plaintiff and its assignor and this defendant.

5. The Court erred in assuming jurisdiction to determine and in determining that the schedule of maximum charges for sewer serv-

ice as set out and specified in Section 6 of the ordinance franchise, which is made Exhibit A to the bill of complaint in this case, are confiscatory.

6. The Court erred to the prejudice of this defendant in decreeing that the defendant had the power and authority under its charter, granted it by the Legislature of Alabama, to fix just and reasonable [fol. 76] rates and charges for sewer service.

7. The District Court erred to the prejudice of this defendant in decreeing that this defendant was under legal duty or could be compelled by a State or Federal Court to agree to the new or proposed schedule of maximum charges for sewer service which are sought to be put in force and effect by this suit.

8. The Court erred in holding that the defendant with respect to the schedule of charges set forth in the ordinance franchise, copy of which is attached to the original bill in this cause, were not secured by a valid contract between the parties, plaintiff's assignor and the defendant, whilst the defendant was acting in its proprietary or contractual capacity.

9. The Court erred in decreeing that the plaintiff, by enforcement of the charges for sewer service as set out in the franchise ordinance, copy of which is made Exhibit A to the bill of complaint, would be deprived of its property without due process of law and contrary to the Fourteenth Amendment of the Constitution of the United States.

10. The Court erred to the prejudice of the defendant in decreeing that the plaintiff in being required to furnish sewer service at the rates specified in the franchise ordinance would be denied the equal protection of the law.

11. The Court erred to the prejudice of the defendant in holding that the defendant had the power under its charter to regulate or fix by ordinance or otherwise, reasonable and just rates or charges for sewer service in the City of Opelika.

12. The Court erred to the prejudice of the defendant in decreeing that the plaintiff has authority to propose other and different schedule of maximum charges for sewer service in excess of those set out in section 6 of the ordinance franchise, copy of which ordinance is attached to the bill of complaint as Exhibit A, and in further decreeing [fol. 77] that the District Court had authority or jurisdiction to compel the defendant to put into force and give effect to the higher rates proposed by the plaintiff.

13. The Court erred to the prejudice of the defendant in confirming that part of the Master's report that shows the sum of Fifteen Thousand Three Hundred and Thirty Dollars added to the value of plaintiff's property devoted to public use, as "going concern value".

14. The Court erred to the prejudice of the defendant in overruling the exceptions of the defendant to the Master's report, which ex-

ceptions are numbered 21, 22, 23, 24, 25, and 26, and relating to going concern value.

15. The Court erred to the prejudice of the defendant in decreeing that the plaintiff is entitled to the relief prayed for in the prayer to the bill of complaint.

16. The Court erred to the prejudice of the defendant in making perpetual the preliminary injunction granted in this cause.

Wherefore, the appellant prays, that said decree appealed from be reversed and that said District Court for the Eastern Division of the Middle District of Alabama be ordered and directed to render a decree reversing the decision of said District Court in this cause and directing that a decree be entered dismissing the bill of complaint.

N. D. Denson, N. D. Denson & Sons, Dickinson & Dickinson, J. J. Mayfield, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 78] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

CITATION—Filed July 24, 1923 [Duplicate; omitted in printing]

[File endorsement omitted.]

[fol. 79] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

CITATION AND SERVICE—Filed July 24, 1923

The United States of America to Opelika Sewer Company, plaintiff in the above-styled cause, or Judge B. P. Crum or Steiner, Crum & Weil, the plaintiff's attorneys of record, Greeting:

Whereas, City of Opelika, defendant in the above styled cause, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the District Court of the Eastern Division of the Middle District of Alabama, made in favor of Opelika Sewer Company and has filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court, at the

City of Washington, within thirty days after this date, to do and receive what appertains to justice to be done in the premises.

Given under my hand, at the City of Montgomery in the Middle District of Alabama, this the 24 day of July in the year of our Lord, One Thousand Nine Hundred Twenty-three.

H. D. Clayton, Judge of the District Court of the United States for the Middle District of Alabama.

Service of the foregoing writ is hereby accepted the same as if service had been made by Marshal, this July 25, 1923.

Barnes & Walker, Steiner, Crum & Weil, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 80] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

STIPULATION AS TO FACTS—Filed July 24, 1923

It is hereby stipulated and agreed between attorneys of record for appellant and the attorneys of record for appellee: for purposes of the appeal in this case.

1. It is stipulated and agreed that neither the District of Opelika nor the City of Opelika has never owned constructed or operated a sewer system or plant; but that the system and plant of the plaintiff below, defendant on this appeal, and that of its predecessor in title, has been used by the District and the City of Opelika and the inhabitants thereof, and that it is the only system of sewer service now in use by the City of Opelika or its inhabitants.

2. It is stipulated and agreed that there is a Public Service Commission created by the laws of Alabama and authorized to fix and regulate rates and charges of certain public service corporations; but that said Public Service Commission of Alabama has not now and never has had authority or power to fix or regulate charges or rates for public service of sewer companies, and it has no authority to fix or regulate rates or charges of the Opelika Sewer Company, the defendant on this appeal.

3. It is further stipulated and agreed that the evidence and testimony taken in this case, other than that specified in the præcipe [fol. 81] and agreement of counsel shall be omitted from the transcript to be made by the Clerk for the record on this appeal. It is however stipulated and agreed that there was evidence on the trial in the District Court and taken before the Special Master which

tended to support each of the findings of the Master. This evidence and testimony omitted from the transcript for the record on the appeal is omitted for the reason that it is and was the contention of appellant, defendant in the court below, that all of the questions and matters referred to the Special Master — ascertain and report — were improperly so referred by the Court; that the questions so referred to the Master by the District Court were irrelevant, and immaterial to any issue upon the trial of this cause, because the District Court had no jurisdiction to inquire into or to determine any of the matters or questions so referred to the Master. It is understood that this agreement is without prejudice to any right of appellee to move a dismissal of the appeal.

N. D. Denson, J. J. Mayfield, N. D. Denson & Sons, Dickinson & Dickinson, (Attorneys for Appellant.) Barnes & Walker, Steiner, Crum & Weil, (Attorneys for Appellee.)

The above stipulations of counsel are hereby approved by the Court.

This July 24th, 1923.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 82] In the District Court of the United States for the Eastern Division of the Middle District of Alabama

[Title omitted]

Statement of the Evidence—Filed July 24, 1923

The defendant, City of Opelika, makes the following stipulation as to the evidence to be embraced in the record on the appeal which has been taken by the defendant on this cause for the Supreme Court of the United States at Washington, D. C.

1. Defendant offered in evidence the Act of the General Assembly of Alabama establishing a new charter for the District of Opelika, approved February 20, 1899 and published in Local Acts of Alabama of 1898-99 at page 1133 to 1160, inclusive, in said Local Acts and which is in words and figures as follows, towit:

Exhibit in Evidence

(No. 584.) (H. 608.)

An Act to Establish a New Charter for the District of Opelika.

Section 1. Be it enacted by the General Assembly of Alabama, That the inhabitants of the District of Opelika, in the County of Lee, shall be and continue a body politic and corporate by the name of the District of Opelika, hereinafter called the City of Opelika.

[fol. 83] and by the name of the District of Opelika may sue and be sued, contract and be contracted with, receive and grant, and do all other acts as natural persons in respect to the powers herein granted, and may purchase, receive, hold, or let, sell, alien, grant or assure real, personal and mixed property and dispose of the same for the use and benefit of the city, and may have and use a city seal, which may be altered at pleasure.

Sec. 2. Be it further enacted, That the corporate limits shall embrace and consist of the following described tracts, lots and parcels of land, towit: All of Sections 7 and 18 and the west halves of Sections 8 and 17, in Township 19, Range 27, and the east halves of Sections 12 and 13, in Township 19, Range 26, in Lee county, Alabama.

Sec. 3. Be it further enacted, That the government of said city shall consist of, and its corporate powers be exercised by, a mayor and eight aldermen, hereinafter called the board, who are residents of said city, and who shall be elected as hereinafter provided for. That the Opelika police board, who are in office when this act takes effect, shall remain and continue in office, and exercise all the rights and powers, and perform the duties thereof until the fourth Monday in April, 1899, or until their successors are elected and qualified. That there shall be elected on the third Monday in April, 1899, and biennially thereafter on the third Monday in April, a mayor and eight aldermen, whose term of office shall begin on Monday next after their election and continue for two years, and until their successors are elected and qualified. Elections holden under this act shall be by ballot by the male inhabitants of said city who are of and over the age of twenty years, who have resided in said city for three months and are qualified voters under the general election laws of the State. Should the election not take place on the day fixed for the election of Mayor and aldermen, the corporation shall not for that cause be dissolved, but the incumbents shall remain in [fol. 84] office till their successors are elected and qualified, and it shall be the duty of the mayor and aldermen to fix some day as early as convenient within one month thereafter, on which the election shall be held, and should the mayor and aldermen fail or neglect to provide for the election as herein directed, they shall be guilty of a misdemeanor. And should a vacancy occur in the board by death, resignation, removal from the city, or from any other cause except on a contest of election, the remaining members of the board shall fill the vacancy at the next regular meeting of the board, or as soon thereafter as practicable.

Section 3½. Be it further enacted, That said District of Opelika shall be divided into four wards, whose boundaries and limits shall be as follows, to wit: The first ward shall be and consist of all that portion of the District of Opelika lying northwest of the Western railway and northeast of Chambers Street; the second ward shall be and consist of all the portion of the District of Opelika lying southwest of Chambers Street and northwest of the Western railway; the

third ward shall be and consist of all that portion of said District of Opelika lying southeast of the Western railway and southwest of Chambers Street, and the fourth ward shall be and consist of all that portion of the District of Opelika lying southeast of the Western railway and northeast of Chambers street; that in said election the said aldermen shall be selected, two from each of said wards, and said aldermen so chosen shall be resident citizens of the respective wards which they are chosen to represent.

Sec. 4. Be it further enacted, That the elections for mayor and aldermen, held under this act, shall be conducted according to the laws governing elections for officers under the laws of this State so far as the same may be applicable except as herein otherwise directed. That it shall be the duty of the mayor and city clerk to provide for [fol. 85] the opening of the polls, and to give ten days' notice of the election by publication in some newspaper of the city of the time and place of holding such elections and the names of the inspectors. The said board of mayor and aldermen shall appoint to conduct said election three inspectors, two of whom shall be of opposite factions, who shall be qualified voters in said election, and who shall also perform the duty of returning officers. The inspectors shall, as soon as the polls are closed, proceed to count the ballots cast, and certify the result of the election to the mayor and aldermen of said city. They shall enclose the ballots cast, their certificates and the poll list in a box, and after carefully sealing the same, deliver said box with its contents to the clerk of said city, who shall give said inspectors his receipt for said box, stating in the receipt the condition of said box when received by him, and on the following Monday deliver the said box and contents to said mayor. The mayor and aldermen of said city, or a majority of them, shall immediately after the delivery of said box, poll list and inspectors' certificate, proceed to open said box, and by a verification and footing up of said returns so made by said inspectors (and by a count of the vote if deemed necessary by the board) ascertain which of the candidates have received the highest number of votes for the respective offices, and declare their election to the respective offices of the persons who shall have received the largest number of legal votes for the respective offices to be filled at said election, and shall give certificates of election to the persons so found to be elected. In case said mayor and aldermen, or a majority of them were candidates at said election, then the city clerk and chief of police of said city shall foot up the returns after being duly sworn to act honestly in the premises, and declare the result and issue the certificates of election as above stated. The said certificates of election so issued by the mayor and aldermen or a majority of them, or by the city clerk and chief of police, shall [fol. 86] entitle the persons so certified to the possession of their respective offices immediately upon the expiration of the terms of office of their predecessors as fixed by law, subject, however, to contestation of their rights as is hereinafter provided.

Sec. 5. Be it further enacted, That any election held under this act may be contested by any qualified elector in said city, by the com-

testant filing his grounds of contest in the office of the clerk of the Circuit Court of Lee County and giving security for the costs of such contest, to be approved by said clerk. The contestant must make the statement of the grounds of contest and give notice to the person whose election is contested within twenty days after he is declared elected by having served on him or left at his usual place of residence by the sheriff or some constable of the county, a copy of the grounds of contestation, verified by oath of the contestant, or some one for him, that he believes the same to be true. Such contest must be heard and decided by the judge of the Circuit Court, but either party may demand a trial by jury, whereupon issues must be made up under the direction of said judge and submitted to a jury. The said Circuit Court shall have jurisdiction to determine the contest and render the proper judgment and enforce the same. If the person whose election is contested is shown to be ineligible, judgment must be rendered declaring the election void as to such office, and the vacancy must be filled by the board. The said election may be contested for fraud of any manager of the election, or ineligibility of the person declared elected, or on account of illegal votes, or for offers to bribe or bribery, or any other misconduct calculated to prevent a fair, full and free exercise of the elective franchise by those entitled to vote at said election. The said court may adjudge the cost of said contest as in its discretion it may deem just. If it appears that the contestant received the highest number of legal votes cast at the election, he must be declared elected. If it appears that two persons [fol. 87] have received an equal number of votes, it must be so adjudged and the office must then be filled by an election by the board. The said Circuit Court shall have full power to prescribe rules for procedure in such cases, and cite the party whose election is contested to appear and make defense and to enforce obedience to its orders.

Sec. 6. Be it further enacted, That a majority of said board of mayor and aldermen shall constitute a quorum, and that a majority of said board must be present at the meeting in order to transact any corporate business, but any number, not less than four, may assemble at their regular place of meeting and adjourn from day to day and compel the attendance of absent members in such manner and under such penalties as the board may prescribe; that the board may determine the rules of its proceedings, may fine its members for absence or disorderly behavior while said board is in session. In the absence of the mayor at any meeting of the board the members present may select a presiding officer, and in case of sickness or temporary absence of the mayor from the city, or inability to serve from other good cause, he may appoint any one of the aldermen to act as mayor pro tempore, and the alderman so appointed shall have all the powers and perform all the duties of the mayor until the mayor resumes his office.

Sec. 7. Be it further enacted, That it shall be the duty of the mayor to preside and keep order at the meetings of the board; he shall call special meetings of the board whenever, in his opinion,

the interest of the city requires it; and he may punish any contempt while the board is in session by a fine not exceeding $25, and by imprisonment for not longer than forty-eight hours, for each offense, one or both, to be enforced in the same manner that judgments of the recorder are enforced, and by the same officers. He shall keep an office in said city, and shall receive such fees or salary, one or both, as the board shall prescribe as compensation for his services. The mayor shall be ex-officio recorder and shall perform the duties [fol. 88] of said office as hereinafter prescribed. The mayor shall have the right whenever, in his judgment, the good or safety of the city requires it, to require the aid of the sheriff of Lee County, and may also require the aid of any military or volunteer company in said city for the protection of said city and the maintenance of peace and order therein. He shall semi-annually make a statement to the board in writing of the financial condition of the city, which statement shall be published in at least one newspaper published in said city. He shall have the power to suspend the chief of police or any member of the police force until the next meeting of the board, when he must report the fact of such suspension to the board and his reason therefor, that it may take such further action as it may deem advisable. The mayor shall see that all contracts or agreements with the city are faithfully kept and performed, and to this end he shall cause legal proceedings to be instituted and prosecuted against all persons or corporations failing to keep their agreements with the city. The mayor shall have the power to remit or commute fines, costs, forfeitures and penalties, duly imposed for violations of any ordinance or charter provision, but he shall make a report of the same in writing to the board at its next session thereafter. The mayor shall execute all contracts and bonds required in judicial proceedings in the name of the District of Opelika. In all judicial proceedings where, by law, bonds and securities are required for litigants, bonds shall be given for the said municipal corporations, but no securities shall be required herefor, and all such bonds executed in the name of the District of Opelika by the mayor without securities shall be taken by the Courts of the State as a full compliance of the law in such cases, and all laws or parts of law inconsistent with this provisions are repealed so far as the District of Opelika is concerned. The mayor shall exercise general supervision over the fiscal affairs of the city. He shall be charged with faith [fol. 89] and credit of the city in relation to its debt and other liabilities, and he shall be the chief executive officer of the city. He shall perform all such other duties in addition to these herein prescribed, not inconsistent with the laws of the State and the provisions of this charter, as may be required of him by the board. At all meetings of the board the mayor or alderman presiding, may vote upon all questions, motions, or resolutions presented, as if he were not presiding, and in the event of a tie vote, the question, motion or resolution must be held to have failed for want of a majority in its favor.

Sec. 8. Be it further enacted, That the board may appoint a chief of police, clerk and treasurer of said city, and such other officers as they may see fit and think necessary for the good government of the city, and to carry out the provisions herein granted and may prescribe the duties of such officers and their liabilities and powers, and may require them to give bond in such sum as they may see fit for the faithful discharge of their duties, and may remove and discharge any of its officers and employes, and fixe the salaries of the same. For any breach of the bond of such officers suit may be brought in the Circuit Court of Lee county, or other Court having jurisdiction, and such suit shall be conducted in like manner as other suits of like character. The said board shall cause to be kept a regular record or minutes of all proceedings, orders, regulations, resolutions and ordinances of the board, which shall be read to the board, and signed by the mayor or acting mayor, when approved by the board, and the same shall have the force and effect of the record, and a copy thereof certified by the clerk shall be prima facie evidence in any Court or elsewhere, which record shall at all times be open for inspection. The board may, however, adopt a city code, or compilation of ordinances, without setting out the same in full in its record.

Sec. 9. Be it further enacted, That the chief of police shall have in said city all the powers of a constable under the laws of this [fol. 90] State, and be entitled to the fees of such constable. He shall possess within said city all the powers of a peace officer. He shall execute the orders, notices and processes of the board or of the mayor or of the recorder, and shall have power to make any arrest with or without warrants, and shall perfrom such other duties as the board may prescribe: Provided, He shall not be compelled to execute any process as constable, or perform any of the duties thereof, except by order of the board, mayor or recorder.

Sec. 10. Be it further enacted, That the city recorder shall keep an office in said city, and shall hear and determine all cases of violations of by-laws, ordinances or charter of the city, and impose the penalties prescribed therefor; and it shall be his duty to report to the board, at least once a year, under oath, all fines, penalties and forfeitures fixed by him or by an alderman acting in his stead; and he shall possess within the corporate limits all powers and jurisdiction of a justice of the peace in civil and criminal cases, provided, that he shall not be required to take jurisdiction of, try or determine, any cause, as ex-officio justice of the peace that has already come before him as recorder. In case of the absence, death or failure to act from any cause, of the recorder, any alderman may act as such recorder. The recorder, or any alderman acting in his stead, trying any violations of the charter, or by-laws or ordinances shall, upon the conviction of said person, have power to impose a fine not exceeding $50 or to imprison or to sentence to hard labor for the city not exceedings sixty (60) days, one or both (except in cases where a different punishment is prescribed by this act); and all persons convicted of a breach of any by-laws, ordinance or char-

ter provision, failing to pay or secure such fine, may be imprisoned for such failure, or placed to hard labor for the city until the fine and costs are paid, in such manner and for such time as the board may direct. If any person tried in the Recorder's Court is dissatis-
[fol. 91] fied with the judgment of the recorder, or alderman acting as recorder, he may appeal to the Circuit Court of Lee county, said appeal to be returnable to the next term of said Court if taken in vacation, and to the present term if in term time, by giving bond with at least two good sureties, payable to said municipal corporation, to be approved by the recorder or alderman trying the case, in such sum as he may prescribe, conditioned to appear in said Circuit Court when said case is called for trial and from term to term thereafter until discharged by law, or in any event, to pay such judgment as the said Court may render on such appeal: but unless such bond be given within five days from the date of the judgment in the Recorder's Court, then no appeal shall be allowed from such judgment. The proceedings in the Circuit Court on such appeal shall be in all respects as provided by law, in case of appeal from a judgment of a justice of the peace in civil cases, except as herein otherwise provided. On the trial of any such appeal in the Circuit Court of Lee county, any code or book containing the by-laws or ordinances of said city and purporting on the face thereof to be printed, published or prepared by authority of said city, shall be received as evidence of the contents thereof without further proof. From the judgment of the said Circuit Court the defendant may appeal to the Supreme Court of the State, and in all civil and quasi criminal cases the city may appeal to said Supreme Court. The recorder, or alderman acting as such, shall have power to administer oaths, and to compel the attendance of witnesses, and the production of papers and books; and shall have power to punish by fine not exceeding $10 and by imprisonment not exceeding twenty-four hours, any penal bond payable to said city, taken under the charter ordinances of the city, to compel the attendance of any person to an-
[fol. 92] swer a prosecution in said Recorder's Court, and upon his judgment rendered in such proceedings, execution may issue and be enforced as executions from Justice Courts. The recorder shall, after his election and before exercising the duties of his office, file with the clerk of said city an oath of office, taken and subscribed before some officer authorized by law to take and certify oaths, that he will honestly and faithfully perform the duties of his office during his term to the best of his skill and ability. All prosecutions for violations of the charter, by-laws and ordinances of said city that are now pending, or that may be pending at the passage of this act, shall in all respects be governed by the laws existing at the time such offense was committed; nor shall any offense already committed, but for which no prosecution has been begun, be affected by this act, but the same may be prosecuted in all respects as if

thorized by the law existing at the time of the commission thereof, which law is hereby continued in force for such purposes.

Sec. 11. Be it further enacted, That the said mayor and aldermen of said city shall have full power and authority: First, To make, adopt and declare motions, resolutions, by-laws, ordinances and orders in whatever manner and upon whatever subject they see fit to carry out the powers herein granted, and for the good government and order of said city, and to affix thereto penalties for the violation of the same by fine not exceeding $50, and by imprisonment or hard labor for the city not exceeding sixty days, one or both, and all persons convicted for any breach of by-laws or ordinances or charter provision, failing to pay or secure such fine, may be imprisoned for such failure, or placed to hard labor for the city until such fine and costs are paid, in such manner and for such time as the board may direct, not longer than sixty days. Second, To pass all laws and ordinances necessary and proper to prevent contagious and infectious [fol. 93] disease from being introduced into said city; to establish and regulate an efficient quarantine in said city, and within ten miles thereof, and to punish any breach of quarantine laws; to maintain the health and cleanliness of the city, and to this end to adopt and maintain an efficient system of sewerage; to adopt such ordinances and regulations as the board shall deem necessary or expedient for the protection of health, and to maintain a good sanitary condition in public places and on private premises in the city; to prescribe the duties and fix the salaries and compensation of all such health officials as they deem necessary under the existing health laws of the State. Third, To prevent and remove all nuisances at the expense of the person causing the same, or upon whose premises the same may be found, and to declare the costs of such removals to be a lien on the property from which the nuisance is removed, and to collect the same as taxes are collected; to prevent the owners of property in the city from having or permitting pools or ponds of stagnant water thereon, and to cause the same to be removed at the cost of the owner; to control and regulate slaughter houses, and confine the same within specified limits within the police jurisdiction of the city. Fourth, To aid, establish, set up and regulate hospitals, poor houses, work houses and houses of correction. Fifth, To license, tax regulate and restrain theatrical or other amusements; and the selling, retailing, wholesaling or giving away of vinous, malt, spirituous or intoxicating liquors, and to close houses and places for the sale of intoxicating liquors, when, in the opinion of the board, the public safety or peace may require it; but this provision as to liquors is made and shall be exercised, subject to the existing laws for the sale of liquors in the District of Opelika, and such laws are not repealed or affected by this act, but are hereby continued in force. Sixth, To restrain or prohibit gaming, gambling houses, houses of ill-fame, [fol. 94] disorderly conduct, breaches of the peace, riots, unlawful assemblies and public indecencies, and to restrain or prohibit cock fighting, and all games and sports of an immoral character. Seventh, To appoint and regulate night and day watchmen, police, patrol, and

captains thereof, and to maintain a police force of such officers and patrolmen as they may deem necessary. Eighth, To establish, regulate and control markets and market houses, and to pass by-laws and ordinances regulating the sale of meats, vegetables and other like articles within certain places and within certain houses. Ninth, To sink, repair and regulate public wells, and cisterns, to establish fire plugs and public hydrants, and to make all needful provisions for the supply of the city with water, gas and gas lights, electric or other lights, and to control street lamps; to contract for the lighting of the city and its supply of water, and to contract for maximum rates for light, water and heat to private consumers. Tenth, To maintain crematories for the destruction of garbage, either within or without the city limits, and to purchase and hold farms and lands for the farming and use of such garbage. Eleventh, To establish streets, avenues and alleys, and regulate and control the paving and curbing of streets and sidewalks, and the fixing and giving the grade thereof; to compel the removal of obstructions from any highway in the city, and to open, alter, widen, extend, grade, cut down, fill in and pave, or otherwise alter and improve all streets, avenues, sidewalks, alleys and public places of the city; but before opening or widening any street or alley they shall pay to the owners of such real estate, as is appropriated therefor, such amount as the same shall be appraised at by a board of appraisers, composed of three citizens, taxpayers of said City of Opelika, one of whom shall be named by the owner of such real estate, one by the mayor and aldermen, and the two thus named to select the third, but the said mayor and aldermen shall [fol. 95] not be liable for a failure to exercise this power. Twelfth, To establish and build drains, sewers, aqueducts and reservoirs, and to regulate the same, and to pass all laws, ordinances and resolutions to compel owners of lots or real property to ditch and drain the same at the expense of the owner, and to punish any refusal or neglect of the owner or party in charge of such lot or property. Thirteenth, To establish, lay out and improve public parks and regulate the same. Fourteenth, To establish, regulate or change the fire limits within said city, and to pass all laws necessary for the protection of the city against fire, and for this purpose may remove any wooden building or structure, paying the owner thereof a reasonable price; to determine within what limits wooden buildings shall not be erected, and to prevent the reconstruction, repair or enlargement in wood of old buildings within such limits, and to condemn buildings and verandas, and parts thereof which are dangerous or insecure, and to tear down the same, when the owner, on notice, fails to do so, and to regulate or prohibit the erection of awnings or verandas on or over the sidewalks or streets of the city; to regulate and control the erection of powder magazine- within three miles of the city, and to prevent explosives and dangerous substances from being stored within the city, and to regulate the manner in which explosives may be hauled or kept in the city. Fifteenth, To own, lay out, regulate, improve and control city cemeteries, either within or without the city limits, and to sell burial lots in the same. Sixteenth, To prevent the running at large on the streets of all cows, hogs, dogs, or other animals

and to pass all laws deemed necessary by the board for the sale and impounding of said animals; to prevent live stock from being driven through the streets of the city in droves. Seventeenth, To prevent the sale of impure or adulterated food, or the sale of diseased or unsound meats, or decayed fruits and vegetables, or other unwhole- [fol. 96] some articles of food. Eighteenth, To authorize the use of the streets of the city for horse, steam or electric railroads, and to regulate the same, and to attach conditions to any grant of franchises, and to compel such companies to have and keep in repair such parts of the streets, bridges and crossings over which their cars run, as the board may deem proper; to regulate the use of the street for the erection of telegraph, telephone, electric and all other systems of wires and conduits, and to require same to be placed under ground if deemed necessary for public convenience or safety. Nineteenth, To punish all offenses against the peace, good order, morals, health sanitation of the city, or against the person or property of the citizens, and to punish any act which is by law a crime or misdemeanor against the State. Twenty, To regulate and control the running of cars, trains or locomotives upon or across the streets, avenues or alleys of said city; to control and regulate the speed of such cars, engines or trains within the corporate limits of said city; to compel railroad companies and street railroad companies to light their tracks, and to regulate, restrain or prohibit the switching of cars on or across the highways of the city. Twenty-one, To pass all laws necessary and proper for the arrest, with or without warrants, of any person against whom there is a charge made of violating any city or State law, and to confine such person until duly discharged by law; to pass all laws needful for the issuance and execution of search warrants. Twenty-two, To pass all ordinances necessary or proper to secure the safety of persons from fire in halls and buildings let or used for public assemblies, and for entertainments or amusements; to compel owners or lessees of buildings to provide fire escapes and make provision against fires. Twenty-three, To make or cause to be made a compilation of laws and ordinances of the city and to adopt and publish a city code. Twenty-four, To make and ordain all laws necessary [fol. 97] concerning idlers, paupers, vagrants, disorderly or vicious persons, to punish any person who, when put to hard labor for the city, fails to work faithfully, or who escapes or attempts to escape. Twenty-five, To pass ordinances in relation to auctioneers carrying on their business on the streets, and to regulate or prohibit same. Twenty-six, To punish all persons who in any manner obstruct the chief of police, or other policeman or officer in the arrest of any person in said city, or in the discharge of his duty; and to punish all persons who, when called upon, refuse to aid in the arrest of any person. Twenty-seven, To pass and enact inspection laws within the city; to regulate the measuring and weighing of produce or provisions for man or beast, and to provide for the inspection or gauging of liquors. Twenty-eight, To regulate and control the manner of building partition walls and fences; to prescribe rules and regulations for buildings; to appoint an inspector of buildings; to establish a building commission, and to pass all ordinances necessary or proper to

secure safe and strong structures; to regulate and control the cleaning and sweeping of chimneys, the use of lights, stovepipes and flues in stores, shops, stables and other places. Twenty-nine, To pass by-laws and ordinances for the purpose of assessing property adjacent to any street and intersection of streets, for one-half of expense of such sewers as the board may from time to time deem necessary for the purpose of receiving sewerage from houses and lots, and bettering the sanitary conditions of such parts of the city as the board deem advisable. The assessment shall be made upon property on both sides of the street, and near the intersection of streets on which said property may be constructed, and shall be made in proportion to the value of the lots adjacent to such streets and intersections of such streets and benefited by the construction of such sewer. Thirty. The board of mayor and aldermen shall have the power to license and stop such exhibitions, business, vocations, [fol. 98] occupations or professions as are now licensed by the State, and others herein below named, and to punish all persons who do business in said city without having taken out the license required by law or ordinance, and to impose and collect such license, not to exceed the following amounts on the business, vocations, occupations or profession here named, to wit: Auctioneers, $10; barber shops, $10 for first chair, $2.50 for each additional chair; commission merchants and brokers, whether by sample or otherwise, $10; express companies having an office in the city for the business of carrying express matter from Opelika to other points in the State, and from other points in the State to Opelika, $100; hotels, each, $50; but the board may regulate the charges according to the number of rooms, if it deems it proper to do so; restaurants, each, $10; and where rooms are rented in connection therewith, $15; life or fire insurance companies, or their agent for, for each company represented, $50; each accident insurance company or agent, $25; livery or sale stables, each, $25; itinerant traders by sample or otherwise, $25; dealers in fish or oysters, each, $20; transient physicians or vendors of patent medicines, each, $25; undertakers, each, $25; keeping of studs or jacks, each, $5; commercial telegraph companies having an office in the city, in the business of sending and receiving telegraph messages from points within the State to Opelika, and from Opelika to points within the State (except business for the Federal Government), $100; telephone companies, $100; carts, drays, wagons, hacks, coaches or omnibuses, each, $15; pawn brokers, each, $50; each agent for the sale of commercial fertilizers, each, $25; cotton buyers who buy for shipment, each, $15; watchmakers or repairers, each, $10; bakers, each, $10; tin shops, each, $10; coal or wood dealers, each, for each yard, $10; dealers in lumber or brick, each, $25; dancing masters, each, $15; skating rinks, each, $15; ice cream saloons, each, $5; real estate agents, each, $25; plumbers or gas [fol. 99] fitters, each, $25; ice factories, each, $100; lightning rod agents, each, $25; photograph or art galleries, whether in house or tent, $25; news dealers, each, $5; fruit stands, each, $10; marble yards, each, $20; architects or superintendents of buildings, each, $25; commissary or grub cars, whether run by railroads or in-

dividuals, for each car used in selling goods within the corporate limits, $100; dealers in fire works or pyrotechnics, each, $10; Boot-blacks, each, $5; dealers in pistol cartridges, each, $10; veterinary surgeons, each, $10; job printing offices, when run by steam, gas, electricity or water power, $25 each; job printing offices, when run by hand, each, $15; newspaper offices, daily, each, $25; newspaper offices, weekly, each, $15; newspaper offices, monthly, or otherwise, except daily or weekly, each, $10; wood-sawyers, by machinery, each, $10; each railroad company having an office in, or running cars in or into the city for the business of transporting freight or passengers from Opelika to other points in the State, and from other points in the State to Opelika, the amount to be fixed by the board; each sleeping car company having an office in, or running cars into said city for the business of transporting freight or passengers from Opelika to other points in the State, and from other points in the State to Opelika, $100; each railroad or steamboat ticket broker or scalper, $25; each loan association or company making loans in the city, $100; each dealer in machinery or agricultural implements, when principal stock in trade, $25; each corn or flour mill, $25; each agent for the sale of cotton gins, $25; bicycle exchange or repair shop, $10; laundries, each, $10; each wholesale dealer in oil or agents for same, $50; each contractor or firm of contractors, whose gross receipts exceed $1,000 per annum, $25; each person running hand cart, $10; owner of dog, within the corporate limits, for each dog, $1; each drummer or runner for a hotel or boarding house, $10; each sawmill, $50; each sash or blind factory or agent for same, $25; each person or company engaged in the business [fol. 100] of making abstracts of titles, $10; sausage factories, each, $10; lawyers, doctors, dentists, whose gross business does not exceed $1,000, each, $5; whose business does exceed $1,000 and does not exceed $2,000, each, $20; whose gross business does exceed $2,000, each, $25; cotton, stock or produce exchange, $25; junk dealers or dealers in hides or old iron, each, $20; each drover or dealer in horses or mules other than liveryman, $25; cabinet makers or proprietors of wood shops, each, $10; building and loan associations, each, $100; each merchant tailor, $25; every grinder of a hand organ or strolling band of music, per week, $5; each theatrical, opera or other troups acting or performing in the city, each day, $5; civil engineers and surveyors, each, $25; bill or note collectors, each, $10; each intelligence office, $25; every bottler of beer or ale, $25; dealers in ice, each, $10; each gas company, electric light company or other light company or fuel gas company, $500; brewers or breweries, $100 each; each street railroad company, $250; each bill poster or distributor, $10; each gun shop or gun repair shop, $5; each dye house, $10; each cigar manufactory, $10; each person who gives suppers, not exclusively for charitable purposes, where a charge is made, $5; each dancing house or hall, $15; each public hall, $10; theatres, concert or music halls, $50. The businesses, occupations and professions, exhibitions taxed by the State the said city may tax and license in such sums as the board may deem just and proper; and the said board of mayor and aldermen shall have the right to

tax and license all businesses, trades, occupations, exhibitions and professions not above enumerated and provided for, and to fix the amount of the license at such sums per annum or for a shorter time as the board may deem just and proper. The license to be issued under this act and the ordinances passed in pursuance thereof, shall be signed by the mayor and city clerk, and for the issuance of the license they shall be entitled to charge a fee of one dollar each, to be paid into the city treasury. Whenever any person, firm or corpo- [fol. 101] ration whose business, occupation or profession shall be taxed and licensed as aforesaid, shall be engaged in interstate commerce, as well as commerce wholly within the State of Alabama, then the board of mayor and aldermen shall have full power and authority to tax and license, as aforesaid, the State commerce without prohibiting, regulating, taxing or requiring license for the inter-state business of such person, firm or corporation. Thirty-one, The board of mayor and aldermen shall have the power to assess, levy and collect against general dealers in merchandise, resident of said city, a tax of one-half of one per cent. on the first of January of each year, and to assess, levy and collect against general dealers in merchandise, who are transient, a tax of one-half of one per cent. on the largest amount of merchandise on hand at any one time, while engaged in business: Provided, That the tax above provided shall be in lieu of the ad valorem tax of one-half of one per centum hereinafter authorized to be imposed on such merchandise and the said board of mayor and aldermen shall have power to assess, levy and collect taxes on all property in said city for each year, not exceeding one-half of one per centum on the value thereof as assessed for the State taxation the preceding year. The assessments herein mentioned are to be made by the clerk of said city, or some other person thereunto authorized and appointed by the board, from the State and county assessment books, as assessed for the State taxation the preceeding year, and it shall be the duty of said board to associate with the county tax assessor one or more good and discreet citizens of the city, who shall assist the said county tax assessor in assessing the property of said city. If it shall appear that any property has escaped taxation by the State, the municipal officers on its discovery shall report the same to the tax assessor or collector of the county, whose duty it shall be to assess the same, whereupon the said board shall have full power and authority to levy and collect the full [fol. 102] rate allowed by the Constitution of the State upon such property for the proper year or years as allowed by the Constitution. If any property in said city is assessed and taxed by the State the preceding year, it may be taxed by said city as aforesaid for the current year, whether in existence on the first day of January of the current year or not. If any property has escaped city taxation in previous years, or shall escape hereafter for any year, the board shall have full power to provide for the assessment and collection thereof in a manner not inconsistent with the State Constitution. The board shall be authorized to provide for the assessment and collection of city taxes to the amount of one-half of one per centum of the value of the property, one railroad, telegraph and such like

property, and to take values from the State board of equalization for the preceding year.

Sec. 12. Be it further enacted, That the city of Opelika shall have a prior lien upon all real and personal estate assessed for taxes over and above all other liens that may exist thereon, except those of the State, and upon all sales made under and by virtue of such assessment. The tax collector of said city shall, by a deed, convey to the purchaser at such sale or sales a title superior in the order of priority of liens to that of any liens then existing, save those of the State: Provided, That when a tax is assessed upon property, the owners of which are not known, thirty days' notice of the sale by advertising for once a week, specifying the amount of the tax, shall be given in some newspaper in said city before sale; and, provided further, that no sale of real estate for the payment of taxes assessed against it shall be invalid on account of the same having been assessed, as belonging to any other person than the owner or as the property of an unknown owner, or on account of any informality or irregularity, whatever, in any of the proceedings for its assessment or sale, unless the person seeking to impeach said sale shall show that the taxes so assessed on said property and all penalties and costs accruing on [fol. 103] such assessment and proceedings for sale were paid at the time of such sale.

Sec. 13. Be it further enacted, That the said board is hereby authorized and empowered to pass laws for the sale of real estate and personal property in said city for taxes, whether said real estate or personal property belongs to resident or non-resident owners, or to persons unknown, and to authorize the sale of any one lot or sub-division of lots, or so much of the property as may be necessary to pay the taxes due, and that the owner or any one for him, or any mortgagee, or person having a lien, or transferee, be allowed to redeem at any time within two years from the sale on paying the purchaser or city treasurer for him double the amount of the taxes, costs, and expenses of sale paid by the purchaser, and five dollars for the expense of a reconveyance and legal interest on the amount paid at such sale, from the date of the sale to the day of redemption. Any surplus arising from said sale shall be paid into the city treasury, to be kept as a separate fund by said officer, for the owner, upon the responsibility of his official bond. Interest shall be collected on all taxes assessed from the first day of May next, after the assessment, if not paid by that day; and when any lot or part of a lot has been assessed to any unknown owner, the assessment shall be prima facie evidence of the fact, and the board may by its agent purchase real estate sold for taxes, and in such event, the deed for the same shall be made to the mayor of said city, and his successors in office, to be held by him or the city, which may be redeemed as other lands sold for taxes as aforesaid, and when so redeemed the mayor shall reconvey to the owner at the expense of the latter as aforesaid.

Sec. 14. Be it further enacted, That the board is hereby authorized to establish a sinking fund to provide for the payment of the interest on any bonds that may now be outstanding, or that may hereafter be issued by law, and for the payment and redemption of said [fol. 104] bonds at maturity, and they may appropriate to said fund, not exceeding twenty-five per cent. of the revenue received on account of licenses and taxes on all property within said city. The board shall have power to collect all taxes of said city, and all fines and forfeitures imposed for any violation of any ordinances or charter provision, by execution, levy and sale, and from the operation of such execution, no property of any citizen of said city, or other person against whom the same runs shall be exempt, but this mode of collection shall not prevent the collection thereof in any other manner that may be authorized by this act or by law.

Sec. 15. Be it further enacted, That said board shall have authority to require all male inhabitants of said city who have resided there for ten days and who are between the ages of eighteen (18) and fifty (50) years to work upon the streets of said city for at least five days in each year, under the direction of such officer as the board may appoint: Provided, That any person so required to work may relieve himself from so working by paying into the city treasury a sum to be fixed by the board, not exceeding five dollars. All moneys so collected or paid in, to be used and applied exclusively to the improvement of the streets; provided further, that the inhabitants of said city shall be exempt from working on roads and highways outside the city limits of said city; provided, further, that no male inhabitant of said city between eighteen (18) and fifty (50) shall be exempt from the operation of this section; except such as the board may hereafter expressly by ordinance so exempt.

Sec. 16. Be it further enacted, That whenever any person is in the custody of the city authorities, before or after a conviction of a violation of a city law, and is held for such by the city authorities, and such prisoner has violated any State law, and is charged therewith, such prisoner shall be held by the city authorities until the [fol. 105] sentence of the Recorder's Court shall be fully performed and discharged, except in cases of a charge of felony by the State authorities, in which event they shall deliver the prisoner to the Sheriff of Lee county, to be delivered to the custody of the proper officer, and after the prosecution by the State shall have ended, and the party discharged, either by acquittal or by paying or otherwise satisfying the judgment against him, it shall be the duty of the State authorities to return the prisoner to the city to be dealt with as the charter and ordinances of the city may authorize.

Sec. 17. Be it further enacted, That the board may pass necessary ordinances to compel prisoners sentenced in the Recorder's Court to work upon the streets, or elsewhere, who refuse to work when held under such sentence; and in the event the city has not sufficient room in its prison for its convicts, such persons may be confined in the jail of Lee county until other provision can be made for them.

ing such confinement the sheriff shall receive from the city same compensation for keeping said prisoners that he receives for other prisoners.

Sec. 18. Be it further enacted, That the board of Opelika shall have full power and authority to assess, levy and collect a poll tax from the inhabitants of said city, liable to pay the same, to be applied exclusively to the public schools of the city. The poll tax collected from the white inhabitants of said city, liable to pay the same, to be for the benefit of the free white schools, and those collected from the colored inhabitants shall be for the benefit of the free colored schools of the city—said taxes to be assessed and collected by such officers as the board may appoint under such rules and regulations as it may prescribe; such officers to have the same rights, powers and remedies of the collection of such poll taxes as are now possessed by the tax collector and other officers of Lee county.

Sec. 19. Be it further enacted, That said board shall have the right [fol. 106] to build and construct underground sewers through private property anywhere in said city, or the police jurisdiction thereof, paying to the owner such damages, if any, as will thereby be done to said property, and for the purpose of ascertaining such damages said city may proceed by writ and quod damnum as now provided by law in such cases, except that the jury shall consist of only five freeholders of said city, and such jurors shall be entitled to only one dollar per day each while serving. In case one continuous sewer is to be run through the land of several owners the whole may be joined in one proceeding, the damages, if any, however, to be assessed to each owner separately.

Sec. 20. Be it further enacted, That the board shall have power to establish and maintain free white public schools and free colored public schools in said city in which the children and wards from seven to twenty-one years of age, of all actual residents, shall be entitled to seats as pupils: Provided, that such children are themselves bona fide residents of said city; but non-resident children may be admitted into schools on such terms as the board of education may prescribe, and separate schools shall be provided for the children of citizens of African descent. The public schools of said city shall be under the charge of the board of education, to consist of the mayor and six other person to be elected by the mayor and board of aldermen. The board of education shall have the following powers and duties: 1. To build upon the school property of the city suitable houses for the use and accommodation of the public schools, or to rent such houses, and to keep such houses in repair, and furnish the same with proper furniture and apparatus. 2. To open a sufficient number of schools to meet the wants of the population of the city; elect a superintendent of schools, the principal and all teachers; fix their compensation and prescribe their duties; control the distri- [fol. 107] bution of teachers and pupils among the several schools; dictate the course of instruction, the number and character of text books, the organization of classes and the method of teaching; to prescribe rules and regulations for the government of the schools, and

to exercise such additional powers as will be necessary to give it complete control of the public schools of the city; but the plan of instruction and the rules and regulations adopted by the board of education shall be adhered to unless altered by two-thirds vote. 3. To issue diplomas to all persons who satisfactorily complete the course of study prescribed for the public schools. 4. To charge in the schools such incidental or other fees as may be deemed necessary for the proper conduct thereof. 5. It shall be the duty of the board of education before the first day of June in each year, to prepare and file with the mayor an estimate of the money that will be required for the maintenance of the public schools for the succeeding scholastic year, and the erection and repair of necessary school buildings; and the board of mayor and aldermen of said city shall, so far as they are able with the means at hand, of which the board shall be the judges, make the necessary provisions to supply whatever additional funds may be necessary to meet the estimate so made. All funds devoted to public school purposes in said city, whether derived from the State, county or city, shall be paid into the city treasury, and shall be disbursed as the board of education may direct: Provided, That not more than 4 per cent of the money derived from the State shall be used than for the payment of teachers employed in such schools. 6. To create a board for the examination of applicants for positions as teachers in the public schools of the city; and no person shall be elected as a teacher in such schools who shall not have received a license from such board; and the board of education may, in its discretion, institute competitive examinations of applicants for positions as teachers in the public schools, including licensed [fol. 108] teachers who are applicants for re-election.

Sec. 21. Be it further enacted, That in addition to the license now required by law to be taken out by all persons before selling spirituous, vinous or malt liquors, under the requirements of the general license laws of the State, no person shall sell any such liquors in the District of Opelika hereinafter called city of Opelika, without first paying into the treasury of said city the sum of one thousand dollars for a license, for which sum the board of mayor and aldermen of said city shall issue a license, which shall entitle the licensee to sell spirituous, vinous and malt liquors, both at retail and wholesale, at one place in said city under the provisions of this act for one year from the date of such license, and such license shall not be issued for a longer term than one year at a time: Provided, Before such license shall be issued, the applicant shall give bond, with good security, to be approved by the mayor of said city, in the sum of one thousand dollars, payable to the said City of Opelika, conditioned that the applicant will, during the time he is licensed, keep a decent and orderly house of business, that no boisterous or riotous conduct will be allowed therein, that the laws of Alabama and the ordinances of the City of Opelika relating to the liquor traffic in said city shall be complied with by him, and in case of any breach of said bond by any act intentionally done, the amount thereof shall be liquidated damages and recoverable in favor of said City of Opelika, in the Circuit

Court of Lee county, Alabama; any person who sells any of such liquors in said City of Opelika without first complying with the provisions of this section, shall be guilty of a misdemeanor, and on conviction for each offense shall be fined five hundred dollars, and may be sentenced to hard labor for the county for six months.

Sec. 22. Be it further enacted, That no person engaged in the liquor traffic in the City of Opelika shall keep open doors where liquor is sold or sell the same after ten o'clock at night, before six [fol. 109] o'clock in the morning, on the Sabbath day, Christmas day, any election day, or at any other time that the sale of liquor is forbidden by the general State law, and any person violating any provisions of this section shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred nor more than five hundred dollars for the first conviction, and for each subsequent conviction shall be fined five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

Sec. 23. Be it further enacted, That any person licensed to sell spirituous, vinous or malt liquors in the City of Opelika, who shall sell any such liquors to a minor or knowingly to any person for a minor, or shall sell to any person of known intemperate habits, or knowingly to any person for such intemperate person, shall be guilty of a misdemeanor, and on conviction of either of such offenses mentioned in this section shall forfeit the license to sell such liquors, and shall be fined five dollars, and be sentenced to hard labor for the county for six months, and the conviction of such licensee or his employe for a violation of any provision of this section shall operate a forfeiture of such license in addition to the penalty.

Sec. 24. Be it further enacted, That the board of mayor and aldermen of said City of Opelika and their successors in office, shall have full power and authority to prescribe the place or places where liquor may be sold in said city, and to regulate and control the same in every way not inconsistent with the provisions of this act, and the laws of the State.

Sec. 25. Be it further enacted, That there shall not be allowed in any house where liquors are sold in said city any games of any kind, and there shall not be kept in such house any billiard, pool or any other kind of gaming table, and no place in said city in which liquor is sold shall have any screen, blinds or such glass in the windows or [fol. 110] doors as will obstruct the view from the outside, or any other obstruction of the view through the windows and doors from the outside during the hours such place is kept open for business. Any person violating any provisions of this section shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred nor more than five hundred dollars.

Sec. 26. Be it further enacted, That no person to whom license is issued shall allow drunken or disorderly persons to assemble or loiter in his place of business. Any person violating the provisions of this section shall be guilty of a misdemeanor.

Sec. 27. Be it further enacted, That all places where liquor is sold in the City of Opelika shall front and be on a level with the street.

Sec. 28. Be it further enacted, That no suit shall be maintained against said city upon any claim for money until application shall have been made to the board for payment thereof, and the said applicant refused in whole or in part, or the board fail at the next regular meeting to act thereon.

Sec. 29. Be it further enacted, That no prosecution, suit or claim whatsoever, pending or to be brought under existing laws, and no right of action accrued, nor proceeding commenced, nor prosecution now or hereafter commenced, for any offense already committed, nor any existing right, remedy or defense shall be impaired, affected or altered by the passage of this act, nor shall any fine, forfeiture or penalty already accrued be released or impaired thereby, but all such rights, proceedings, prosecutions, remedies, defenses, fines, forfeitures and penalties shall be enforced under the laws existing at the time they began or accrued, in the same manner as if this act had not been passed, and all existing laws and ordinances of said city, adopted in pursuance of law, shall remain in force until repealed or modified by the board as far as the same are not in conflict with this charter, and all powers granted by this act must be liberally construed in [fol. 111] favor of the power of the city to pass such laws.

Sec. 30. Be it further enacted, That this act shall go into effect on and after the first day of May, 1899.

Sec. 31. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed.

Approved February 20th, 1899.

J. G. PALMER was duly sworn as a witness for the defendant and testified as follows:

I was mayor of Opelika the first time in 1900 and was mayor of Opelika in December, 1901. Here the witness was shown the following paper writing, to wit:

"The Sanitary Sewer Company
Contractors and Engineers

December 26, 1901.

To the Mayor and Board of Aldermen of the District of Opelika.
Opelika, Alabama.

GENTLEMEN:

We hereby accept the franchise passed in our favor November 7th, 1901, and the amendments thereto, passed November 19th, 1901, and hereby agree to all the conditions contained therein.

Respectfully, The Sanitary Sewer Company, By J. E. Lewis, President. John H. Cromie, Jr., Secretary. (Seal.)"

and testified with respect to said paper writing as follows:

I have seen this paper writing before. I have been a member of the Board of Aldermen or the mayor of Opelika continuously since [fol. 112] 1900. Yes, I recall the granting of the franchise by the City of Opelika to the Sanitary Sewer Company and the construction of the sewer system under that franchise. I recall the rate for sewer service that was put in effect with the installation of the sewer system in Opelika and it was the rate provided in the ordinance franchise, granted the Sanitary Sewer System, and has been the continuous rate of sewer service up to the 1st of January, 1922. It was put in operation by the Opelika Sewer Company, assignee of the Sanitary Sewer Company. I don't think there was any complaint to the City of Opelika by the Sewer Company as to the inadequacy of that rate up to December, 1921. They did contemplate raising the rates, but the city objected to any raise and it was not done. But I do not recall what time that was, possibly a year before December, 1921. I think it was the fall of 1920. Yes, I was Mayor of Opelika at the time the ordinance was passed granting the sewer franchise to the Sanitary Sewer Company. The Sanitary Sewer Company suggested the schedule of charges for sewer service embraced in the ordinance franchise and we finally agreed with the Sanitary Sewer Company on that schedule of rates for sewerage.

It was conceded that the paper writing hereinabove mentioned and set out was filed with the City Council on the 26th day of December, 1901.

The said witness on cross-examination testified substantially as follows:

Yes, I think the sewerage company had in an informal way discussed rates several times with me and the council, but made no formal request of the city with respect to the rates. The Sewer Company did notify me that it was not getting a just return. I recall that that was done one time, possibly there were other times. They did not call our attention to it or discuss it with us several times before the year 1920. They did not take it up in a way that the city [fol. 113] had to act on it. It was mentioned to me as mayor by the company several times when representatives of the company were here. Yes, I notified them I was unable to give them any relief on account of the fact that the rates were fixed in the charter.

N. D. Denson, Dickinson & Dickinson, J. J. Mayfield, N. D. Denson & Sons, Attorneys for Appellant. Barnes & Walker, Steiner, Crum & Weil, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING STATEMENT OF EVIDENCE—Filed July 24, 1923

The parties having agreed upon the above as the statement of the evidence it is approved as being correct.

This July 24, 1923.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 114] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed July 24, 1923

It is hereby agreed and stipulated between the parties plaintiff and defendant in this cause, and their counsel of record that the following shall operate as the præcipe to the Clerk, indicating the portions of the record to be incorporated in and omitted from the transcript of the record on the appeal, taken by the defendant in this cause, to the Supreme Court of the United States, sitting at Washington, D. C.

1. The bill of complaint, including the exhibits thereto.

2. Motion of the defendant to dismiss the bill of complaint.

3. Decree of the Court, dated April 3rd, 1922.

4. The answer to the bill of complaint and the amendment to the answer.

5. Decretal order of the court and decree denying motion to dismiss the bill, entered April 3rd, 1922, and authorizing the issuance of the writ of injunction.

6. The writ of injunction, issued April 5th 1922.

7. Order of Court appointing Horace Stringfellow, Esq., Special Master, of Date July 22, 1922.

8. Motion of defendant to dissolve the writ of injunction, which motion was filed May 4th, 1923.

9. Order of the Court made on the 10 day of April 1923, setting this cause down for hearing at Montgomery, Ala., for May 4th, 1923.

10. Report of Special Master, Horace Stringfellow, Esq., filed [fol. 115] February 26th, 1923.

11. Exceptions to the Master's report, filed March 10th 1923.

12. Amendment to exceptions filed by the defendant to the Master's report, of date April 9th, 1923.

13. Decree of the Court, filed June 27th, 1923.

14. And all other pleadings not hereinabove specified which are on file or of record in this cause.

15. And all orders, judgements, decrees, or decretal orders of the court, not hereinabove specifically specified which are on file or of record in this cause.

16. Petition for appeal, filed July 24th, 1923.

17. Order allowing appeal and fixing bond, signed and filed July 24th, 1923.

18. Appeal bond, filed and approved July 24th, 1923.

19. Assignment of errors, filed July 24th, 1923.

20. Citation of appeal, issued July 24th, 1923, and acceptance of service thereon by counsel.

21. Statement of evidence.

22. Statement of stipulations of counsel for appellant and for appellee.

N. D. Denson, J. J. Mayfield, N. D. Denson & Sons, Dickinson & Dickinson, (Attorneys for Defendant, Appellant).

We hereby agree that the above and foregoing præcipe is correct; that the records, documents, papers and proceedings therein set forth and referred to and stipulations of counsel are sufficient for a complete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript, and we hereby waive the issuance and service of notice upon any party hereto, and agree that said præcipe shall be obeyed by, and acted upon by, the clerk as fully and to all intents and purposes in the same manner as if said præcipe had been regularly filed and a true copy thereof served upon each party hereto. [fol. 116] This stipulation shall not prejudice any right of appellee to move a dismissal of the appeal.

Barnes & Walker, Stenier, Crum & Weil, (Attorneys for the Appellee).

[File endorsement omitted.]

[fol. 117] In the District Court of the United States for the Eastern Division of the Middle District of Alabama

[Title omitted]

Motion and Order Extending Time—Filed April 7, 1922

To the Honorable H. D. Clayton, Judge of said Court:

Comes the City of Opelika, the defendant in the above entitled cause, and moves the Court to grant it an extension of thirty days from this date in which to file its answer to the bill of complaint in the above entitled cause.

N. D. Denson & Sons, Attorneys for Plaintiff.

Upon consideration of the foregoing petition and for good cause shown, it is ordered that said petition be granted, and that the time within which the defendant is required to answer the bill in the above entitled cause be and hereby is, extended for a period of thirty days from this date.

Done this 5th day of April, 1922.

H. D. Clayton, U. S. Judge.

[File endorsement omitted.]

[fol. 118] In the District Court of the United States for the Eastern Division of the Middle District of Alabama

[Title omitted]

Order Enlarging the Time—Filed Aug. 6, 1923

For a good cause shown to the Court, the time for docketing the cause and filing the record in this case in the Supreme Court of the United States, pursuant to the appeal sued out, is hereby extended until the first day of October, 1923.

Dated this the 6th day of August, 1923.

Henry D. Clayton, District Judge.

[File endorsement omitted.]

[fol. 119] The United States of America:

In the District Court of the United States for the Middle District of Alabama, Eastern Division

In Equity

Clerk's Certificate

I, George Stuart, Clerk of the District Court of the United States for the District and Division as hereinabove written and stated, do hereby certify that the above and foregoing is a full, true and correct transcript of the record in the case in said Court of Opelika Sewer Company, a corporation against City of Opelika, a municipal corporation, under the laws of Alabama, as required by the præcipe, agreement and stipulations of counsel filed in this cause. And that City of Opelika a corporation is the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Opelika, Alabama, this 25th day of August, A. D. 1923.

George Stuart, Clerk of the District Court of the United States for the Middle District of Alabama, By Joseph B. Duke, Deputy Clerk U. S. District Court, Middle District of Alabama, Eastern Division. (Seal of the United States District Court, Middle District of Alabama, Eastern Division.)

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, E. DIV., AT OPELIKA

[Title omitted]

OPINION—Filed April 3, 1922

Suits by Opelika Sewer Company against the City of Opelika. Motion by complainants for preliminary injunction, and by defendant to dismiss the bill. Motion to dismiss denied, and injunction granted.

Barnes & Walker of Opelika, Ala., and Steiner, Crum & Weil of Montgomery, Ala., attorneys for plaintiff.

N. D. Denson & Sons of Opelika, Ala., attorneys for defendant.

HENRY D. CLAYTON, District Judge:

The plaintiff, Opelika Sewer Company, a public utility corporation, alleges in its bill that the defendant, City of Opelika, in April, 1902, adopted an amended ordinance granting to The Sanitary Sewer Company of Philadelphia, and its successors, permission to construct, operate and maintain a sanitary sewerage system in the city for a period of thirty years. Section six of the ordinance provided that the sewer company, and its successors, are "authorized to charge not in excess of the following annual rates for sewerage service, which said rates may be collected quarterly in advance." Then follows the schedule of rates. The ordinance contains other provisions usual in such case and is made an exhibit to the bill.

It is also alleged that the plaintiff having acquired all the rights of the Sanitary Sewer Company under the ordinance, in the year 1902 constructed and has since operated and maintained in the City of Opelika a sanitary sewerage system and disposal works serving the city and its inhabitants and charged until January 1, 1922, the rates specified in the ordinance. It is averred that the fair and reasonable value of the plaintiff's investment is approximately $170,000 and that it has issued and has outstanding $70,000 of five per cent interest bearing bonds; that during the period from January, 1904, to December, 1920, the gross receipts of the company were approximately $58,800 while its actual operating expenses for the same [fol. 121] period were something over $38,000, and the accumulated interest on the bonded indebtedness amounted to about $59,500; that its gross operating receipts during the year 1921 were about $5,300 and its operating expense about $3,200; and that the receipts and operating expenses would be practically the same for the current year. It is further stated that the accrued and unpaid interest on its bonded indebtedness amounts to more than $36,000 and that the plaintiff is otherwise indebted for current expenses for the maintenance and operation of the sewer system in the sum of $7,500; and that although this system has been managed and operated as economically as possible the plaintiff has at no time during its operation been able to earn any dividend whatever on its investment of $170,000 or on its capital stock of $50,000.

The rates prescribed in the ordinance of April 22, 1902, are alleged to be confiscatory because inadequate for a fair return upon the reasonable value of plaintiff's property employed in the service; and that if compelled to continue the service under the rates named in the ordinance it would result in the taking of the plaintiff's property without just compensation in violation of the 14th Amendment of the Constitution of the United States.

Further, it is alleged that in an effort to relieve the situation and in a measure provide for a revenue commensurate with the service and to insure in some degree a fair return upon the plaintiff's property employed in the service, and with the hope of obtaining the cooperation of the city and its authorities, plaintiff petitioned the City Council of Opelika for permission to increase its rates according to the schedule set forth in its petition, which is made an exhibit to the bill; and that although the facts stated therein were not controverted the petition was denied, and that thereupon the plaintiff, upon advice of counsel, promulgated and put into effect the rates named in its petition, and these are alleged to be fair and reasonable to the city and its inhabitants and necessary to the continued operation of the plaintiff's system or plant.

It is charged that thereupon the mayor of the City of Opelika caused notice to be published in the newspapers, advising and warning the citizens of Opelika not to pay plaintiff's increased rates, and [fol. 122] that as a consequence practically none of the plaintiff's patrons are paying anything; that the only feasible way for collecting for the plaintiff's service is to discontinue the service, which it is averred would result in innumerable suits for damages, great annoyance and expense; and that in order to shut off any such customers it would be necessary to dig up the sewer connections in the streets or alleys in the city and that the mayor has ordered the police officers to arrest any of the plaintiff's employees who attempt to dig up any portion of the streets of the city for such purpose; that the city is threatening to take steps to annul the plaintiff's franchise which would destroy or greatly impair its credit and seriously embarrass its financial operations and would result in irreparable injury to the plaintiff.

The prayer of the bill is for injunction pendente lite which is asked to be made perpetual on the hearing, restraining the City of Opelika, its officers, agents and servants, from interfering with the plaintiff in the enforcement of the rates prescribed by it, and for general relief. The defendant has not answered but moves the dismissal of the bill upon the ground that it is without equity and upon the further ground that the plaintiff by its continued service has acquiesced in the ordinance rates and is, therefore, estopped from questioning the rates.

Plaintiff's contention is that the ordinance does not constitute a contract between the plaintiff and the defendant in so far as it relates to the rates, and for the reason that, (1) the city had no charter power to thus contract, and (2) that if the Legislature has granted such power the grant is in conflict with Section 22 of the Constitution of 1901 of Alabama and, therefore, ineffective. And the de-

fendant insists that the ordinance constituted a valid and binding contract and that the rates therein stipulated can not be changed without its consent. The Public Service Commission of the state has no jurisdiction over utilities of the character here involved.

The jurisdiction of this Court is invoked under the 14th Amendment of the Constitution of the United States which prohibits the taking of property without just compensation. Columbus Ry. P. [fol. 123] & L. Co. v. City of Columbus, 249 U. S., 399. The charter of the City of Opelika provides that the municipality has the power

"to establish and build drains, sewers, conduits and reservoirs and to regulate the same"; and "to authorize the use of the streets of the city for horse, steam or electric railroads, and to regulate the same, and to attach conditions to any franchises, and to compel such commpanies to make and to keep in repair such parts of the streets, bridges and crossings upon which their cars run as the board may deem proper; to regulate the use of the streets for the erection of telegraph, telephone, electric and all other systems of wires, and conduits and to require the same to be placed under ground if deemed necessary for public convenience or safety"; and, "to maintain the health and cleanliness of the city, and to this end, to adopt and maintain an efficient system of sewerage, to adopt such ordinances and regulations as the board shall deem necessary or expedient for the protection of health and to maintain a good sanitary condition in public places and on private premises."

The plaintiff insists that the rates specified in the ordinance granting the franchise is not a contract but merely a schedule of rates subject to change and that these rates are so low as to be confiscatory.

On the other hand the defendant insists that the rates stipulated in the ordinance are an inseparable part of the franchise contract and are binding upon the plaintiff.

The rule well established in reported cases is that if the rates fixed in a statute, ordinance or order of a commission are so inadequate that their enforcement would be equivalent to the taking of property for public use without just compensation to the owner they should not be observed, and because there must be afforded a fair return upon the property at the time of its use for the public benefit. In recognition of this rule the Supreme Court said in Newton v. Consolidated Gas Co. of N. Y., March 6, 1922, — U. S. — (in Ms.), that,

"The General doctrine applicable when rates are alleged to be confiscatory has been so often stated that present discussion of it is unnecessary. Knoxville v. Water Company, 212 U. S. 1; Willcox v. Consolidated Gas Company, 212 U. S. 19; Des Moines Gas Company v. Des Moines, 238 U. S. 153; Rowland v. St. Louis & S. F. R. R. Co., 244 U. S. 106; Denver v. Denver Union Water Company, 246 U. S. 178; Lincoln Gas Company v. Lincoln, 250 U. S. 256."

In the Home Tel. & Tel. Co. v. Los Angeles, supra, the Supreme Court had under consideration the question here presented. There the charter of Los Angeles granted to the city the power to "regulate telephone service in the use of telephones within the city and to fix

and determine the charges for telephones and telephone service and connections"; and other comprehensive powers in this connection [fol. 124] were contained in the charter. In that case the Court held that while these provisions were sufficient to authorize the exercise of the governmental power of regulating charges they gave no authority to enter into a contract to abandon the governmental power itself. This case has been repeatedly followed. Milwaukee Ry. Co. v. Commission, 238 U. S. 181; Winchester v. Winchester Water Works, 251 U. S. 192. In the case of Knoxville Gas Co. v. City of Knoxville, 261 Fed. 283, where the question is fully discussed and authorities collated, the Circuit Court of Appeals in discussing the provision of the charter, broader than those here involved, said,

"The power to fix rates to be charged by Public Service Corporations is governmental, and resides primarily in the State, and municipalities cannot exercise such power unless the State has in fact surrendered its power in that behalf."

* * * "It is the settled rule that a state's surrender to a municipality of power irrevocably to fix rates for a public service corporation, must appear in explicit and convincing terms, and all doubtful expressions are to be resolved in favor of the State, and against the surrender of the power."

This was also the holding of the Court in the case of O'Keefe, Receiver, v. City of New Orleans, 273 Fed. 560.

In Ottumwa Ry. & Light Co. v. City of Ottumwa, 178 N. W. 905, the court said:

"In fewer words the cases proceed on the general theory that it is against public policy to contract for unchanging rates; that there must be no such contract because its enforcement might, on the one hand, fasten what proves to be an exhorbitant charge upon the patrons, or, on the other, prove a rate that will confiscate the property of the service corporation. While there are other lines of reasoning advanced in the authorities, in the main, and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy."

In that case it was held that a 5-cent fare provision in the franchise ordinances did not constitute a binding contract, and the Court restrained the City from interfering with the railway in increasing its rate of fare.

It seems to me that the reasoning in Denver v. Stenger, decided by the Circuit Court of Appeals, Eighth Circuit, December 29, 1921 — Fed. —, must be followed in the instant case. There the District court, whose ruling was affirmed, enjoined the City of Denver from enforcing a maximum fare fixed by ordinances and the City insisted that,

[fol. 125] "The acceptance of the ordinances and franchises under which the Tramway Co. * * * operate a street railway in the City * * * constituted contracts binding upon both parties * * * and that there was power to make them * * * and that they were valid and binding contracts until the City * * * thinks proper to change the rate;"

and the Appellate Court said,

"* * * the only important question raised upon the record * * * is as follows: Is there an existing contract between appellant and the Tramway Company in virtue of which the Tramway Company is bound to carry passengers for the fares prescribed by the ordinances and franchises mentioned. * * * These ordinances were not contractual in form nor in substance. Subject to constitutional limitations, the City and County of Denver had the power to change the fares at any time. These ordinances to which reference is now being made granted the Tramway Company nothing. They were limitations upon the power of the Tramway Company to fix its own fares. So the Tramway Company accepted nothing that it was not compelled to accept if the fares were not confiscatory. We are of the opinion, therefore, that they did not constitute contracts binding upon either party so far as the question of fares was concerned. * * * These ordinances provided for a fare of five cents for a single passage on any line of the Tramway Company. They were not contractual in form but they did grant rights of way as above stated which were accepted by the Tramway Company. It is claimed by appellant that the five cent fare was a condition of the grant and its acceptance created a binding contract on the part of the Tramway Company. * * * These ordinances were not contractual in form and adopting the construction placed upon the same by the appellant, we do not see how they could be called contracts binding upon both parties. * * * If, however, the appellant can at any time change the fares, in other words, refuse to be bound by the contract, how does more delay cure the lack of mutuality? A party to a contract is bound or he is not bound from the time of its execution. To say that a party is bound as long as he wants to be bound simply means that he is not bound at all. Upon the question of whether the parties to these ordinances intended to contract and upon the question as to whether if there was a contract it would be void for want of mutuality, the following cases seem to us to be decisive against the claim of appellant: Home Telephone Co. v. Los Angeles, 211 U. S. 265; Puget Sound Traction Co. v. Reynolds, 244 U. S. 574; Rogers Park Water Co. v. Fargus, 180 U. S. 624; San Antonio Public Service Co. v. City of San Antonio, 257 Fed. 467; City of San Antonio v. San Antonio Public Service Co. 225 U. S. 547; Central Power Co. v. City of Kearney, Court of Appeals 8th Circuit, opinion filed July 13, 1921; City of Dallas v. Dallas Telephone Co., 272 Fed. 410; and numerous other cases are cited.

In the same case, Denver v. Stenger, supra, the provision of the Constitution of Colorado is quoted in these words:

"The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

And the Court concludes that:

"We are of the opinion that the quoted provisions of the Colorado [fol. 126] Constitution under the interpretation given similar provisions in the Constitutions of the States of Texas, Missouri, and Louisiana, the Code of Iowa and Statute of Nebraska, clearly prohibit the making of a contract suspending the power of the City and County of Denver or the City of Denver to regulate the fares of the Tramway Company. The history of the litigation in regard to the Constitutional provisions of the State of Texas are to be found in San Antonio Traction Co. v. Atlgelt, 200 U. S. 304; San Antonio v. San Antonio Public Service Co., supra; San Antonio Public Service Co. v. City of San Antonio, supra; City of Dallas v. Dallas Telephone Co., supra. The case of State ex rel. City of Sedalia v. Public Service Comm., 275 Mo. 201, construes the Missouri Constitution. Southern Electric Co. v. City of Chariton, 255 U. S. 539, construes the Iowa Code. Central Power Co. v. City of Kearney, supra, construes the Statute of Nebraska. O'Keefe v. City of New Orleans, 273 Fed. 560, construes the Louisiana Constitution. The public policy of the State of Colorado as shown by her constitution, statutes, charters and decisions is opposed to the contracting away of the power of regulating and fixing rates of public utilities through the exercise of the police power. The claim that the legislative power of the City and County of Denver is not subject to the provisions of the Constitution of Colorado is not supported by reason or authority. The trial court having for just cause enjoined the rates shown to be confiscatory and the Council of the City and County of Denver refusing to make any other rates than those enjoined it became necessary in order to operate the Tramway Company to make some provision in regard to rates. Of course the court had no general power to regulate or make rates or fares for the Tramway Company, but it was its duty to make some order to prohibit the Tramway Company from charging what it pleased and therefore fix certain rates which the receiver should not exceed. These being only temporary for the purpose of the receivership. We think the trial court acted in the premises, clearly within the law, and the facts, and the order granting the temporary injunction and refusing to dismiss the appellee's petition should be affirmed, and it is so ordered."

The settled rule in Alabama is that:

"Municipal corporations can exercise only such powers as are expressly granted in their charter, or such as may be necessary and proper to carry such express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created. And any reasonable doubt as to the existence of a power claimed to be conferred by the charter will be resolved by the courts against the corporation and in favor of the public". Birmingham, etc. Co. vs. Birmingham, etc. Co., 79 Ala. 465.

If, however, the legislature had granted or attempted to grant, such power to the municipality as here claimed, manifestly, its act would have been in violation of Section 22 of the Constitution of Alabama, which provides

"That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."

The language employed in this provision of the fundamental law of the State is comprehensive and its purpose as well as its meaning [fol. 127] is plain.

The Supreme Court of Alabama in discussing this provision, intimated, in some of its decisions, that legislative power might be granted to contract for fixed rates for a reasonable period, but in City of Mobile vs. Mobile Electric Co., 203 Ala. 574, considering the power to make grants and contracts of this character, declared that

"This power can neither be abdicated nor bargained away, and it is inalienable even by express grant, and all contracts and property rights are held subject to its fair exercise."

In the former appeal of this case, 201 Ala. 607, the Court said:

"The municipality cannot in the exercise of its delegated contractual right, perpetually or for an unreasonable time, fasten upon the tax payers and inhabitants rates and obligations that cannot be changed or regulated during reasonable intervals so as to meet changed conditions and thereby void extortion and oppression."

And in Birmingham, etc. Co., vs. Birmingham, etc. Co., supra, wherein the Supreme Court was considering Section 23 of the Constitution of 1875—a companion to Section 22 of the present Constitution, though not so comprehensive as the latter Section—it was held that neither the charter of the City of Birmingham, nor the general statutes conferred on that corporation the power to grant by ordinances in the nature of a contract, the exclusive franchise in perpetuity for running a street railway through certain designated

streets and avenues of the city; and that if such power were granted by its charter, or any public statute, it would be violative of that constitutional provision against the passage of any law "making any irrevocable grant of special privileges or immunities."

There is nothing in Weller vs. Gadsden, 141 Ala. 642, cited by counsel for defendant, opposed to this view. The question here presented was not under consideration there, and while it was said in that case that the latter clause of Section 22 of the Constitution had reference to grants and the revocations, alterations and amendments thereof by "the Legislature", it is difficult to preceive how, if the Legislature is prohibited from making such grants directly, it would have the power to make them indirectly by delegating the authority to the municipality. The court in that case recognized [fol. 128] that the constitution reserved in the Legislature the power to revoke, alter or amend such franchises.

Decisions of State Courts relating to matters of local law, such as the construction of a state constitution and statute, and the power of local municipal corporations, must be regarded by the federal courts as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. Old Colony Trust Co. vs. City of Omaha, 230 U. S. 100; 57 L. Ed. 1410, except, of course, as has been aptly said, "It cannot be expected that this court will follow every such oscillation from every cause arising, that may possibly occur". Gelpcke vs. Dubuque, 68 U. S. 175; 17 L. Ed. 520.

The case of San Antonio vs. San Antonio Public Service Company, supra, is in point, and would seem to be conclusive of this question. The Court in that case had under consideration a provision of the Taxes Constitution, practically the same as Section 22 of the Alabama Constitution, except that the latter is perhaps more rigid. The Court unequivocally held that the Legislature of the State of Texas was prohibited by the organic law of that State from granting a municipality power to contract for fixed rates to be charged by a public utility corporation, and in South Iowa Electric Co. vs. Chariton, 255 U. S. 539, that Court said:

"The right of a municipality to regulate street railway fares, gives no power to violate the United States Constitution 14th Amendment, by enforcing a confiscatory rate."

Section 228 of the Constitution of Alabama, cited by counsel for the City, has no application. That Section is a limitation upon the power of cities and towns of more than six thousand population (a class to which the City of Opelika does not belong) to grant certain franchises for a longer period than thirty years, and does not in any manner conflict with Section 22.

I am, therefore, constrained to hold that the City of Opelika did not make or have power to make irrevocable rates to be charged by this public utility; and it appears that the ordinance rates are unreasonably low.

It follows that the motion to dismiss the bill must be denied (see foot notes to Rule 29, Hopkins New Fed. Eq. Rules, 3d Ed.) and

that interlocutory injunction must issue. Accordingly it will be so ordered.

[fol. 129] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

In Equity

CLERK'S CERTIFICATE

I, George Stuart, Clerk of the District Court of the United States for the Middle District of Alabama, Eastern Division, hereby certify that the above and foregoing is a true and correct copy of the only opinion which has been filed in the cause of Opelika Sewer Company, a corporation against City of Opelika, a municipal corporation, pending in said Court, and the same is herewith transmitted with the record in this cause to the Supreme Court of the United States.

Given under my hand and seal this the 25th day of August, 1923, at Opelika, in said District.

George Stuart, Clerk U. S. District Court, Middle District of Alabama, By Joseph B. Duke, Deputy Clerk. [Seal of the United States District Court, Eastern Division, Middle District of Alabama.]

[File endorsement omitted.]

Endorsed on cover: File No. 29,834. M. Alabama D. C. U. S. Term No. 524. City of Opelika, appellant, vs. Opelika Sewer Company. Filed August 27, 1923. File No. 29,834.

FILED
DEC 1 1923
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

October Term, 1923.

No. 324.

CITY OF OPELIKA, *Appellant*,

vs.

OPELIKA SEWER COMPANY, *Appellee*.

Appeal from the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLANT.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant,*

vs.

OPELIKA SEWER COMPANY, *Appellee*

Appeal from the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLANT.

Statement of Case.

Appellee Sewer Company brought suit in the Federal Court in Equity in Alabama against Appellant City of Opelika, and sought to have cancelled and annulled a schedule of maximum rates or charges for sewer service rendered by appellee to appellant and its inhabitants. The main if not the sole equity of appellee's bill was that the maximum rates or charges for sewer service collected by appellee Sewer Company were so low as to be confiscatory, and that for appellee to be compelled to perform the sewer service for such small compensation was to deprive it of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of

the United States. The principal theory upon which appellee proceeded in the lower court was that the appellant City of Opelika had fixed the schedule of maximum rates or charges for sewer service in the exercise of its governmental powers, granted or delegated to it by the Legislature of the State of Alabama; that consequently the rates or charges assailed were law fixed rates and were so low as to be confiscatory and therefore in violation of the Federal Constitution.

The City of Opelika disputed and denied the asserted equities in appellee's bill of complaint upon the ground that the bill, together with its exhibits, affirmatively showed that the maximum rates sought to be annulled were not law fixed rates, but were contractual rates, agreed to by and between the appellant and the appellee, and their respective predecessors in title and right, and consequently could not be confiscatory in the sense that a State law was in violation of the Fourteenth Amendment to the Federal Constitution. The City of Opelika, appellant, claimed and insisted in the lower court that the bill, together with its exhibits, affirmatively showed a lack of equity for that the charter of the City of Opelika, of which the court would take judicial knowledge and notice, conferred no power upon the City of Opelika to fix a schedule of maximum or other rates and charges for sewer companies or other public service corporations; and consequently the schedule of maximum rates and charges in question could not be law fixed rates for the reason that neither the City of Opelika nor its predecessor in title or right had any power or authority to fix any rates or charges for public service corporations, and that the bill and its exhibits affirmatively and conclusively showed that the maximum rates and

charges sought to be annulled were contractual rates and beyond the power of the court to cancel or annul.

The appellee Sewer Company, in reply to this contention of the City of Opelika, appellant, contended and sought to show that the ordinance contract (pp. 6-13 of printed record) which fixed the schedule of maximum charges for sewer service, and which was made an exhibit to the bill and admitted in the answer, was void because it was in violation of Section 22 of the Constitution of the State of Alabama, which provides: "No ex post facto law, nor any law, impairing the obligation of contracts, or making any irrevocable or exclusive immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." The appellee Sewer Company therefore insisted that if the schedule of maximum rates and charges sought to be annulled should be held to be contractual, that the contract was void, in that it sought to grant an exclusive and perpetual right or franchise to the appellee Sewer Company, or its predecessor in title and right, in violation of the quoted provision of the Constitution of Alabama. The trial court ruled and decreed in accordance with the contention of the appellee Sewer Company, and sustained the equity of the bill.

The City of Opelika, appellant, then answered the bill of complaint, denying all of the asserted equities of the bill, setting up the facts which it claimed showed that the rates in question were contractual and not law fixed rates; that such rates were proposed by the appellee Sewer Company, and accepted by the City of Opelika; that in consideration of such rates or charges the City of Opelika granted to the Sewer Company,

or its predecessor in title and right, the franchise, right and privilege to construct, operate, and maintain a sewer system in the City of Opelika, and to use its streets, alleys and commons for such purposes; that the Sewer Company accepted the franchise, constructed and operated a sewer system in the City of Opelika and for the inhabitants of such city for a period of nineteen years without complaint that the rates or charges were too low, or that they were confiscatory, and that consequently the Sewer Company was bound by the contractual rates, and that it was therefore estopped from claiming that they were confiscatory, or that the City of Opelika had the authority or power to change or fix other rates or charges, much less that it was under the duty or obligation to fix higher rates or charges which the residents or inhabitants of Opelika should be required to pay for such service. The City also denied that the rates or charges in question were confiscatory.

The case was submitted on these issues, and a special master was appointed to take evidence as to whether or not the rates or charges were so low as to be confiscatory. Testimony was taken before the special master upon these issues, and he reported back to the court his findings to the effect that the rates were confiscatory. The City of Opelika reserved certain exceptions to the report. The court affirmed the report of the special master, granted the relief prayed, and from that decree the City of Opelika prosecutes this appeal.

The charter of the City of Opelika, which is a special act of the Legislature of Alabama, was introduced in evidence and appears in the record. (pp. 52 to 70 of printed record). The ordinance contract

which fixed the rates in question was made an exhibit to the bill, was admitted in the answer, and appears in the record (pp. 6 to 13). It is shown without dispute that the City of Opelika is the successor in title and in right to the District of Opelika, which is mentioned in the answer. It is also shown without dispute, and is admitted, that the Opelika Sewer Company is the successor in title and in right to the Sanitary Sewer Company of Philadelphia, Pennsylvania. There is no contention or dispute of the fact that the City of Opelika is in all respects the same as the District of Opelika; that it was a mere change of name of the municipality from that of the District of Opelika to the City of Opelika; nor is there any dispute or contention but that the Opelika Sewer Company is the successor to all the rights, authority and powers of the Sanitary Sewer Company; nor that all of the duties imposed upon the Sanitary Sewer Company are likewise imposed upon the Opelika Sewer Company.

Specification of Errors Relied Upon.

1. The decree of the District Court appealed from in this case is erroneous in that

(a). The bill alleged no sufficient facts to confer jurisdiction upon the District Court to hear or determine the controversy involved between the parties to the suit.

(b). Because the allegations of the bill fail to make a case of diverse citizenship, or a case arising under the Constitution or laws of the United States, or a case which involves a dispute or controversy as to the effect or construction of the Constitution or laws of the United States upon the determination of which the result of the suit depends.

(c). Because the bill of complaint fails to state any facts to present a suit which substantially and really involves a dispute or controversy between the parties to the suit as to any right which depends upon the construction of the Constitution or any law or treaty of the United States, or any other Federal question.

(d). Because all the allegations of the bill as to any Federal question involved are mere conclusions of the pleader, which conclusions are not justified nor supported by any facts, but, to the contrary, the facts alleged in the bill negative the conclusions of the pleader as to any Federal question claimed to be involved.

2. The decree of the District Court appealed from in this case is also erroneous in holding that the ordinance franchise involved in this case [see printed pages 6 to 13] violated Section 22 of the Constitution of the State of Alabama, which provides: "That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration or amendment."

3. The decree of the District Court appealed from in this case is also erroneous in decreeing that the schedule of maximum charges for sewer service set forth in the ordinance, copy of which is attached as Exhibit A to the bill of complaint in this case, and shown on pages 6 to 13 of the printed record, was a schedule of governmental or regulatory rates and not contract fixed rates for sewer service between the plaintiff and its assignor and this defendant.

4. The decree of the District Court appealed from in this case is also erroneous in assuming jurisdiction

to determine and in determining that the schedule of maximum charges for sewer service, as set out and specified in Section 6 of the ordinance franchise and made an exhibit to the bill of complaint in this case and as shown on pages 6 to 13 of the printed record, is confiscatory.

5. The decree of the District Court appealed from in this case is also erroneous in decreeing that the defendant, City of Opelika, had the power and authority, under its charter granted it by the Legislature of Alabama, as is shown on pages 52 to 70 of the printed record, to fix just and reasonable rates and charges for sewer service.

6. The decree of the District Court appealed from in this case is also erroneous in decreeing that the defendant was under a legal duty or could be compelled by a State or Federal Court to agree to or enforce the new or proposed schedule of maximum charges for sewer service, which are double the contract rates, as shown on page 16 of the printed record, and which are sought to be put into force and effect by this suit.

7. The decree of the District Court appealed from in this case is also erroneous in decreeing that an enforcement of the charges for sewer service, as set forth in the franchise ordinance, would be to deprive the sewer company of its property without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States, or that in the enforcing of such contract the sewer company would be denied equal protection of the law guaranteed to it by the Fourteenth Amendment.

8. The decree of the District Court appealed from in this case is also erroneous in decreeing that the City of Opelika had the power, under its charter,

which is shown on pages 52 to 70 of the printed record, to regulate or fix, by ordinance or otherwise, reasonable and just rates or charges for sewer service in the City of Opelika.

9. The decree of the District Court appealed from in this case is also erroneous in decreeing that the Sewer Company was entitled to the relief prayed for in the bill of complaint, which enjoined the City of Opelika from enforcing the contract rates fixed in the franchise ordinance, and in making perpetual the preliminary injunction granted in the cause.

Argument.

The trial court never acquired jurisdiction of the subject matter of this suit, for the reason that no Federal question was involved. The bill of complaint, together with its exhibits, affirmatively showed that the rates in question were contractual rates and not law fixed rates, and hence could not be confiscatory. The bill did not show any law of this State, or any ordinance, ruling or regulation of the municipality which had the force and effect of law, that deprived the complainant Sewer Company of its property without due process of law.

The power to fix rates and charges for public service corporations, or for businesses affected with a public interest, is a sovereign power, or, rather, an incident to sovereignty. Rates or charges for such public service companies are fixed and regulated only by the sovereign, or by some agency of the sovereign, such as a municipal corporation, or such board or commission created by the sovereign upon which the power to fix and regulate rates has been conferred or delegated by the sovereign. The authority or power of a

municipal corporation to provide a system of water works, electric lights, a sewer system, etc., does not necessarily carry with it the power to fix or regulate the rates or charges for furnishing water, lights or sewer service, to the city or its inhabitants. It requires an express grant by the sovereign to the municipality to confer the power to fix or regulate rates or charges, or the authority or power to fix and regulate must be conferred by necessary implication. The law is well settled in Alabama, and has been affirmed by the Supreme Court of the United States, that municipal corporations are strictly political institutions. Legislative sanction is therefore indispensable to their existence. They have no other capacity or power than that which is expressly conferred, or which is necessary to carry into effect the purpose of their creation. They are merely governmental agencies, organized by legislative enactment to share in the civil government of the country, but chiefly to regulate or administer the local or internal affairs of the city, town, or district which is incorporated. Whatever power they have is delegated to them by the State. Consequently, legislation which is permitted to be exercised by a municipal corporation is a mere delegation of the power of the State, and must be consistent with the laws of the State.

Railroad v. Dunn, 51 Ala. 128.

Mayor v. Wetumpka Co., 63 Ala. 611.

Municipal corporations, however, have two classes of powers: one, legislative or governmental, delegated by the Legislature which authorized or created the corporation, by virtue of which they control their inhabitants as a sovereign; the other power is a private, proprietary, or public power, by means of which they

act and contract for the private advantage of their inhabitants and for the municipal corporations themselves. In the exercise of governmental or legislative powers and functions the officers of a municipal corporation are trustees for the public, and with few exceptions they can make no grants or contracts which will bind the municipality beyond the terms of their office; but in the exercise of their private, proprietary or public powers it and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way as an individual, and in their exercise the municipality will be governed by the same rules which control and govern the individual or a private or business corporation.

Omaha Water Co. v. City of Omaha, 147 Fed. 1, 12 L. R. A. (N. S.) 736.

The record in this case, we insist, conclusively shows that the City of Opelika, in fixing the rates or charges for sewer service here in question, was exercising a private, proprietary, or business power, and not a legislative or governmental power. This, for the reason that the record conclusively shows that neither the City of Opelika nor its predecessor in title and right, the District of Opelika, ever had conferred upon it, either expressly or by necessary implication, the authority, power or right to fix rates or charges for any public service to be rendered it or its inhabitants by public service corporations or individuals who might perform such services which were affected with a public interest. The bill or complaint contained no express or necessarily implied allegation that the City of Opelika or its predecessor, the District of Opelika, ever had conferred upon it the power to fix or regulate rates or charges for public service corporations.

The charter of the District and the City of Opelika was introduced into the record (pp. 52 to 70) by the City of Opelika, and it of course speaks for itself; and in it cannot be found the delegation by the Legislature of the authority or power to fix or regulate rates or charges of any public service corporation, and certainly not for sewer service to be performed by the appellee or any other person or corporation furnishing sewer service to the City of Opelika or its inhabitants. The charter, however, does expressly confer the power upon the corporation to contract and to be contracted with for the purpose of obtaining necessary and proper supplies of water, light, gas and sewer service. (See p. 59 of record). The record, also, conclusively shows that the City of Opelika, or its predecessor in title and right, the District of Opelika, and the appellee, Opelika Sewer Company, or its predecessor in title and right, the Sanitary Sewer Company, did enter into a contract by which the appellant granted to the appellee the right and franchise to construct, operate and maintain a system of sewer service in the corporate limits of the City of Opelika, and to use its streets, alleys and commons for such purpose, and that in consideration of the right and privilege so granted the appellant agreed to furnish sewer service to the City and its inhabitants at not to exceed the stipulated maximum rates. (See pp. 6 to 13 of record). The record shows that these rates were proposed by the appellee, agreed to by appellant, and put into force and effect by an ordinance which is nothing more in effect than a contract between the appellant and appellee. In making this contract, in the passage of this ordinance, and in agreeing to these rates the City of Opelika was exercising

no legislative or governmental power, but was exercising its proprietary or business power for the use and benefit of the municipality and its inhabitants. This ordinance franchise, which specifies the schedule of rates or charges for sewer service, is shown on pages 6 to 13, inclusive, in the record. It is made an exhibit to the bill of complaint. It is the sole authority relied upon by appellee to operate a sewer system in the City of Opelika. Without the ordinance franchise, it is conceded that the appellant would have no right or authority to operate a system in Opelika, or to collect any rates or charges for sewer service from the City of Opelika or its inhabitants. It is the only ordinance or authority which the appellee Sewer Company has shown which authorizes it to charge or collect tolls, fees or charges for sewer service; and yet the bill of complaint prays, and the decree of the court grants the prayer, that the appellee Sewer Company may continue to operate and maintain its sewer system, and that it may collect twice the tolls, fees or charges which are provided for in its charter. (See p. 16 of record). In other words, the trial court decrees an enforcement of all the rights acquired by the appellee Sewer Company from the City of Opelika under and by virtue of its charter, and that it shall be paid twice the amount of compensation which its charter stipulated should be paid it for its service and in consideration of the rights acquired by its charter. It is difficult to understand how the trial court could read this charter granted by the City of Opelika to the Opelika Sewer Company and say that the rates provided for in the charter were not contractual rates. There is not an intimation in any provision of the charter that the rates or charges for sewer service

should be anything other than contractual rates. The entire ordinance, from beginning to end, the preamble, body, and every provision, shows conclusively that it is nothing but a contract between the City of Opelika and the Opelika Sewer Company, or their predecessors in title and right. The title or caption of the ordinance in part is to authorize the City of Opelika "to contract with the Sanitary Sewer Company, of Philadelphia, Pa., its successors and assigns, to build and operate" a sewer system. The preamble shows the considerations, reasons and inducements which led the City of Opelika to grant the franchise in question. It authorized the Sewer Company to lay pipes and conduits in the streets of the City of Opelika, and to maintain and operate them for a period of thirty years. In consideration of the Sewer Company constructing and operating a sewer system, the city agreed to forego its right to construct or operate a system, as it was authorized to do in its charter, during the life of the contract between the City and the Sewer Company. It provided how the sewer system should be laid and constructed and maintained. It provided that the Sewer Company should furnish the City of Opelika, free of charge, such sewer service as might be required for the City Hall and the County Courthouse so long as the City Council should have their office in the council chamber of the courthouse, the City School, and all other municipal offices; but in consideration of such free service the City agreed to pay to the Sewer Company a sum annually equal to all taxes and licenses on the sewer system due to the City. The franchise of the Sewer Company contained a schedule of maximum rates which the Sewer Company was authorized to charge. It was provided

that laundries, breweries, livery stables, ice factories, slaughter houses, and all connections of whatever description not enumerated in the schedule, should be charged special rates, and that all such special rates should be fixed by mutual agreement between the parties interested, and in proportion to the charges specified in the schedule. It was provided that after the expiration of ten years the City should have the right to purchase the sewer system at a price to be fixed by five disinterested appraisers. It also provided that the Sewer Company should submit to the City plans, specifications and survey for the sewer system, and that such plans should be approved by the City before the franchise right should become effective. It also provided that the City should pass ordinances with adequate penalties for the protection of the Sewer Company in the proper use of its system, and the necessary connections, catch-basins, manholes, and other appurtenances. It also provided that the Sewer Company should file with the Clerk of the City of Opelika its written acceptance of the franchise and its obligations, terms and conditions, and then expressly provided that thereafter such ordinance, the obligations, terms and conditions of it, "shall thereupon become and be a contract between the said Sanitary Sewer Company, its successors and assigns, and the District of Opelika." The City also gave its assent to a charter to be granted by the Legislature of Alabama incorporating the Sewer Company under the name of the Opelika Sewer Company, and when so incorporated it should become the assignee of the Sanitary Sewer Company as to all rights, franchises, privileges and contractual rights granted, but that it should be subject to all the obligations, liabilities, con-

ditions and disabilities imposed by the ordinance. It also provided that if the Sewer Company should at any time abandon or cease to operate the sewer system, the City might, by ordinance, declare the system of sewers abandoned, and that the City might take possession and control of the system and operate it. In other words, the franchise granted the Sewer Company contained a provision for its forfeiture. How it is possible for a court to construe this ordinance otherwise than a contract between the Sewer Company and the City of Opelika, is difficult to understand. It is and can be nothing but a contract in the form of an ordinance, that being the only way in which the City could contract. That the ordinance was a contract and intended as such is shown by the fact that the Sewer Company was required to accept or reject the ordinance, and it did accept in the following terms: "We hereby accept the franchise passed in our favor November 7, 1901, and the amendments thereto, passed November 19, 1901, and hereby agree to all the conditions contained therein," signed by the Sewer Company. (Page 30 of the Record). Surely the schedule of rates contained in the ordinance was a part of the conditions. And the 12th section of the ordinance provided that when the ordinance was accepted by the Sewer Company it should "thereupon become and be a contract between the Sewer Company, its successors and assigns, and the District of Opelika." (Page 12 of the record).

It is difficult to frame an argument to show that this ordinance was a binding contract between the City of Opelika and the Sewer Company, for the reason that the language is so plain and conclusive that

it is difficult to frame an argument more persuasive or conclusive than the very language of the ordinance.

Ga. Rwy. and Power Co., et al. v. Town of Decatur, U. S. Supreme Court.

Advance Opinion (1922-23) 669-673, 67 U. S. L. ed. and cases there cited.

Milwaukee, etc. Co. v. R. R. Com., 238 U. S. 174, 183, 59 L. ed, 1254.

The trial court, in its opinion, followed the reasoning in the case of *Denver v. Stenger*, decided by the Circuit Court of Appeals, December 29, 1921, 277 Fed. 865. With all respect for and deference to the opinion of the learned judge who decided this case, we are compelled to argue and say that the case which he followed ought not to be made an authority for the decision in this case, for the reason that the facts in the two cases are entirely different. The learned judge in this case quotes at length from the opinion in the case of *Denver v. Stenger, supra.* In that case the Circuit Court of Appeals held that the ordinances there in question "were not contractual in form nor in substance;" that the ordinances there in question to which references were then being made "granted the Tramway Company nothing. They were limitations upon the power of the Tramway Company to fix its own fares. So the Tramway Company accepted nothing that it was not compelled to accept if the fares were not confiscatory. We are of opinion, therefore, that they did not constitute contracts binding upon either party so far as the question of fares was concerned." The ordinance here in question is entirely different. It granted valuable rights, franchises and privileges to the Sewer Company. In fact, the ordinance itself granted the only rights the Sewer

Company had to operate a sewer system in the City of Opelika. The Sewer Company did accept this grant. It had the option to accept or reject, and it chose to accept, and operated the sewer system for the charges prescribed in the schedule for nineteen years without complaint. The ordinance here in question is wholly contractual in form. In the *Denver Case,* above, followed by the trial court, under the constitution and statutes of that State, as shown by the opinion of the Circuit Court of Appeals, the City of Denver had conferred upon and delegated to it the power to fix and regulate fares and charges of public service corporations, and the holding of the court in that case was that it was against the public policy of the State for a municipality to contract away its power of regulating and fixing rates of public utilities through the exercise of the police power. In the case at bar, the City of Opelika is shown to have no such power to fix or regulate rates as did the City of Denver. It only had the power to construct or provide a sewer system, which power, of course, carried with it, by necessary implication, the power to employ or hire others to provide the City with a sewer system. It had no power, expressed or implied, to fix or regulate the fees or charges of sewer companies, or any other public utility. Its entire charter is set out in the record, and in it nowhere can be found any expressed or implied authority to fix rates or charges for sewer service, otherwise than by contract with the sewer company, which it did, as is shown by the record. It is difficult to follow the reasoning of the trial judge in holding that the ordinance in question was void because in violation of Section 22 of the Constitution of Alabama, which

provides, among other things, "that no irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." The trial court argues and decides that the ordinance was void because it was an attempt to make an irrevocable and exclusive grant of special privileges; but yet it decrees that the ordinance shall be enforced, and the franchise rights of the Sewer Company preserved, but that it shall receive twice the consideration for its service that is required of it by the ordinance than was provided for and agreed to by the Sewer Company. If the ordinance or franchise was void because irrevocable or exclusive, it was just as irrevocable and exclusive when the Sewer Company was paid twice the charges for its services as it was when it received half that amount. In other words, the schedule of rates or charges which the Sewer Company was authorized to collect did not prevent the franchise from being irrevocable or exclusive. If the franchise was void because irrevocable or exclusive in violation of this provision of the Constitution, it was void *in toto*. The court could not declare it void in part and enforce it in part; it being a contract, agreed to between parties, the court could not modify it or make a new contract for the parties. The court must declare it void or valid *in toto*. Yet the effect of the decree of the trial court in this case is to hold the ordinance and franchise void, insofar as it attempted to provide a schedule of rates, but valid in all other respects. We insist that the court had no such power. Under the contract ordinance here in question, which granted the Sewer

Company its franchise, rights and privileges, the Sewer Company agreed to furnish, free of charge to the City of Opelika, sewer service for the City Hall, County Courthouse, and the City Schools; but in consideration of such free service the City agreed to pay to the Sewer Company annually an amount equal to all taxes and licenses of the sewer system due to the City of Opelika. (Bottom p. 8, top p. 9, of Record). Would it be contended by anyone that the court could require the City of Opelika to pay a sum annually equal to double the amount of taxes and licenses on the sewer system due to the City of Opelika? Surely if the court could require the City of Opelika and the inhabitants thereof to pay to the Sewer Company twice the amount agreed to in the schedule of rates forming a part of the charter, it could likewise require the City to pay a sum equal to double all taxes, instead of a sum merely equal to all taxes, paid by the Sewer Company to the District of Opelika. If the decision of the trial court is correct, then for the same reason the court could require the City or the patrons of the Sewer Company to pay twice the amount agreed to for all special rates. It will be observed that the ordinance contract, which forms the franchise of the Sewer Company, provides that laundries, breweries, livery stables, ice factories, slaughter houses, and all connections of whatever description not enumerated in the schedule, should be special rates, and that all special rates should be fixed by mutual agreement between the parties interested, but in proportion to the charges enumerated in the schedule. Now, if the court has the power to compel the City and the patrons of the Sewer Company to pay double the amounts enume-

rated in the schedule for service, which schedule was agreed to, then by the same reasoning the court could require the payment to the Sewer Company of double the amount which might be fixed by mutual agreement as to all special rates.

As above stated, the ordinance, considered as a whole, and nearly every provision in it, shows that it was nothing but a contract between the City and the Sewer Company; and that the rates and charges were agreed rates and charges, and not law fixed rates and charges. There is not a provision in the ordinance nor in the franchise which intimates that the charges were fixed by law, rather than by contract. In fact, every provision which refers to the tolls or charges for the service rendered expressly provides for contract or agreed rates. The schedule of rates fixed or enumerated in the ordinance only provides a maximum; that is, the Sewer Company is allowed to fix any rate or charge within the schedule, provided it does not exceed the maximum amount which is named or fixed in the schedule.

The trial court, in its opinion, quotes with approval from the opinion of the Circuit Court of Appeals in the case of *Knoxville Gas Co. v. City of Knoxville*, 261 Fed. 283, to the effect that "the power to fix rates to be charged by public service corporations is governmental and resides primarily in the State, and municipalities cannot exercise such power unless the State has in fact surrendered its power in that behalf. * * * It is a settled rule that a State surrender to a municipality of power irrevocably to fix rates for public service corporations must appear in explicit and convincing terms, and all doubtful expressions are to be resolved in favor of the State and

against the surrender of the power." We fully concur in this statement of the law. It is well stated by Mr. Dillon, in his work on Municipal Corporations, Vol. 3, Section 1325, where he says that "a city or other municipality has no power to regulate the rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority so to do," and cites many authorities in support of the text. We fully concur in this statement of the law, and invoke its application to this case. It is shown by this record that the City of Opelika has no power to fix or regulate the rates to be charged by public utilities; that the Legislature has not attempted to delegate to it such power or authority; and that the City has not attempted to exercise any such power or authority. It does not follow, however, by any means, that because a municipality has never been granted the authority and power to fix and regulate the charges for service by public utilities, that it has no power to contract for such services by such companies. It is well said by Mr. Pond, in his work on Public Utilities, Section 418, that "the power of the State to regulate municipal public utilities, which includes the power to fix and control the maximum rates they may charge for their services, however, is a sovereign power which our courts hold to be delegated to municipal corporations only in express terms or by clear or necessary implication." It is also well settled law that this right and power to fix and regulate rates may be delegated by the State to municipalities in the absence of a constitutional limitation prohibiting such delegation. It is also well settled law that the power of regulating rates is public and governmental in its nature, and in its operation

and effect, and is intended to redound to the benefit and advantage of the municipality and its inhabitants who receive the municipal public utility service, and the duty of regulating the service and fixing the rates, when delegated to the municipality, is personal and fiduciary in its nature, so that it cannot be surrendered or bartered away by transfer to another or by a contract suspending its exercise for an unnecessary or an unreasonable period. Indeed, the power is a continuous one, and is not exhausted by its exercise, although a certain rate may be fixed for a reasonable period which would constitute the established rate for such a period, and unless and until a rate is prescribed by a State or an agency to which the power may have been delegated, the public utility may fix its own rates for its service.—Pond on Public Utilities, Section 419. Where, however, the State has not delegated this right to the municipal corporation, but has conferred upon it the power of control over its streets, and authorized it to provide for municipal public utility service for itself and inhabitants, as is done in this case, the municipality has the power to install or operate the public utility plant so authorized, and has the power to fix and control the rates by making this a specification of the contract in which it grants to the public utility the special privilege of using the streets and furnishing service to the municipality or its inhabitants, as is done in this case. In regulating the service to be provided by a public utility and the rates to be charged therefor, it is of utmost importance to the public and to the consumers of the service that necessary provisions be made to secure adequate service at reasonable rates, as a condition of the consent granted by the municipality to the use of its streets by

the public utility; and for this purpose the City has ample power to regulate the service and control the rates of municipal public utilities in its own interest and that of its inhabitants, either by making the necessary provisions for doing so in connection with the grant of its franchise, or by provisions to that effect in a contract by which the municipality grants its consent to the public utility to use its streets and to supply its service within the municipality.—Pond on Public Utilities, Sections 420-22, inc.

The Supreme Court of the United States, in the case of *Cleveland v. Cleveland City R. R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, held that under statutory authority conferred upon it to contract for street railway service, the City had the power to fix the rate for such service by an ordinance, and when accepted by the street railway company it became a contract, the court saying: "In reason the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporation to continue those benefits during the time stipulated."

The Supreme Court of the United States also decided, in the case of *City of Detroit v. Detroit Citizens Railway Co.*, 184 U. S. 368, 46 L. Ed. 592, as follows: "It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question including rates of fare. But there can be no question in this court as to the competency of a State Leg-

islature, unless prohibited by constitutional provisions to authorize a municipal corporation to contract with a street railway company as to the rates of fare and so to bind during the specified period any future common council from altering or in any way interfering with such contract," citing a great number of authorities, and concluded as follows: "The contract once having been made, the power of the city over the subject, so far as altering rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract." Where a municipality has power to contract for the services of public utilities it can, in the exercise of such power or right, agree on a fixed rate for a reasonable period of time.—*Omaha Water Co. v. City of Omaha,* 147 Fed. 1, where it is held that in "the making of a contract for the construction and operation of waterworks, wherein the parties agree what rates may be collected by the owner from private consumers during a reasonable term of years, it is the exercise of one of the business powers of the corporation. *The purpose of such contract is not to regulate rates, for there are no rates to regulate. It is to procure water and to get rates for the city and its inhabitants.*" (Italics ours.)

In the case of *Los Angeles Water Co. v. City of Los Angeles,* 88 Fed. 720, it was said by the court: "In procuring water, or any other commodity by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that the general power without limitation in a municipal corporation to supply the city with water does not include the power to agree upon price, it seems to me would be a solecism. * * * This delegation

of power to the city was not of course a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city."

The power to fix rates for services to be rendered a municipality by a public utility has been frequently held to be properly included within the authority of the city to provide for such public utility or services of such companies. It was said by the Supreme Court of Michigan, in the case of *Boerth v. Detroit City Gas Co.*, 156 Mich. 654, 18 L. R. A. (N. S.) 1197: "It may be said, then, that in order to safeguard the rights of its inhabitants who use gas it is not only reasonable that the city should have this power to fix rates, but it is highly expedient; indeed it is necessary that it should possess that power. * * * *The power to prescribe rates by contract, and that is the power which was exercised in this case, is a very different power from the legislative power regulating rates.*" (Italics ours).

Where the municipality has the right to withhold its consent or extend it at will, it has ample power to make all necessary provisions for securing adequate service and reasonable rates, and when these terms and conditions are proposed by a city and accepted by a public utility company and complied with, they become a binding contract.—128 Ind. 531, 28 N. E. 88.

All the authorities hold that after the public utility has accepted the consent of a municipality or conditions specified in a charter or contract and installed its service, the contract is consummated, and where the conditions provided for fixing of rates as a material part of the contract, it is absolutely binding on the public utility. As was said by the Supreme Court of

Indiana, 142 Ind. 538: "The town had the right, in granting the use of its streets, to impose such reasonable requirements, terms, regulations and conditions therein, upon those accepting the privileges and benefits of the grant, as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers." And the court then concluded: "The public utility having accepted the franchise granted by the ordinance and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privilege under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligation to the inhabitants of the town who desire to use its fuel, upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance."

In the case of *Noblesville v. Noblesville Gas Co.*, 157 Ind. 162, 60 N. E. 1032, the court said:

"It would be doing violence to the rules of statutory construction to hold that under the law of 1887 the power of a city, when not reserved in granting a franchise, to prescribe the prices chargeable by its licensee to consumers of its gas, is free from fair and reasonable doubt." The court further said: "That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent of only one body, the other the consent of two. In this instance, the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of

its bargain." If this be sound law and reason—and it seems to us it is—it is conclusive in this case.

In the case of *Muncie Gas Co. v. City of Muncie*, 160 Ind. 97, 60 L. R. A. 822, the city had made a contract with the gas company to operate a natural gas system in said city and to supply gas at not to exceed the maximum rates stipulated in the contract. The gas company attempted to set up the defense that the contract was *ultra vires* the city, and therefore void, because no power was vested in it to enter into such a contract fixing rates to be charged its inhabitants for gas. The court held that since the company had continued to use the streets of said city for the distribution of natural gas to provide consumers by virtue of such contract, it was not within the power of the company to deny the right of the city to enter into such a contract; but in the course of the opinion the court expressed the belief that there was no lack of power in the city to make such a contract; that if the city had the right to grant the franchise it had the right to prescribe and impose the terms and conditions of the grant, and when they were accepted by the gas company, it became a contract. Judge Dillon, in his work on Municipal Corporations, Vol. 3, 5th Ed., p. 2234, says:

"After a valid rate has been fixed by competent authority, the rate so fixed is the limit of compensation which can be exacted by the corporation. It cannot decline to furnish water or light to a consumer at the rates fixed by law and insist that he shall contract therefor at another and a higher rate," citing *Osborne v. San Diego Land Co.*, 178 U. S. 22. The same author, in the same book, Section 1326, p. 2234, declares the law to be that when a municipality grants to a

public utility the right to use its streets for supplying the inhabitants with water, light, etc., and grants such public utility a franchise, that it may prescribe conditions and regulations under which the franchise shall be exercised, and that conditions and stipulations as to rates may be provided for in such contract and are binding, citing *Blair v. Chicago,* 205 U. S. 400; *Los Angeles v. Los Angeles,* 177 U. S. 558. The author also says that a maximum rate prescribed by such ordinance, when it is made a condition of the franchise, is binding upon the grantee of the franchise; that it cannot escape therefrom, and cites a great number of authorities in support of the text. He also says that a stipulation in a contract granting a franchise to supply private consumers at a rate not exceeding a designated amount, is a stipulation for the benefit of the inhabitants and may be enforced by them. These conditions and limitations, however, are intended to operate upon the corporation, the public utility; but whether they are binding upon the municipality, the State, or the public, the author says is quite a different question. The municipality having derived its power from the legislature, must contract, of course, subject to subsequent legislative control; but if the legislature has authorized the municipality to contract, in the absence of some constitutional restriction it may stipulate as to rates and provide that they shall not be reduced during the contract period, and in such cases it is held to constitute a valid, binding contract, protected by the Federal Constitution.—*Walla Walla v. Walla Walla,* 172 U. S. 1; *Los Angeles v. Los Angeles,* 177 U. S. 558, 570; *Freeport Water Co. v. Freeport,* 180 U. S. 587, 593; *Detroit v. Detroit,* 184 U. S. 368.

Judge Dillon, in his work on Municipal Corporations, 5th Ed., pp. 2242, 2243, Section 1326, says that the power to regulate rates is governmental, continuing in its nature, and that it cannot be bargained away, except by an express authority, and because of this principle, cases are to be found which deny the power of the municipality to contract that rates for public services shall remain unchanged for a term of years. The author adds, however, "but it is believed that a close examination of these cases establishes that they were either founded upon the peculiar facts and circumstances of the particular cases, or upon some reserved right by the constitution or statutes which subjected a rate prescribed by contract to future regulation by the legislature or by the municipality acting under delegated power."

Where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.—164 U. S. 471, 163 U. S. 207; *Los Angeles v. Los Angeles,* 177 U. S. 558. In the last case it was held that though a city was without authority to make the contract, but as its action had been subsequently ratified, it was held to be equivalent to a prior original grant.

In the case of *Southern Iowa Electric Co. v. City of Chariton, et als.*, reported in 65 L. Ed. (U. S.) 764, *et seq.*, it was held that if a public service corporation and governmental agencies dealing with it, have power to contract as to rates and assert that power by fixing by contract the rates to govern during a particular time, enforcement of such rates is controlled by the obligation resulting from the contract, and hence

the question as to whether such rates are confiscatory becomes immaterial; and that confiscatory rates for services to be performed by a public service corporation may be enforced if secured by contractual obligations, but not if the rates are law fixed. That line of cases cited in the text must control the decision in this case. To this proposition, which we claim controls this case, Chief Justice White cites a great number of cases, including *Freeport v. Freeport*, 182 U. S. 587; *Detroit v. Detroit*, 184 U. S. 368; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Cleveland v. Cleveland*, 194 U. S. 519; *Columbus Railway, Light & Power Co. v. Columbus*, 249 U. S. 399.

We submit that under the law of Alabama there can be no doubt that the maximum rates fixed by the ordinance here in question were contractual by the obligations resulting from the contract, and that consequently whether such rates were confiscatory or not is immaterial. We submit that the following authorities are conclusive of this question.

Whenever a State court's construction upholds the existence of contract rights instead of denying them, the Supreme Court of the United States will follow the construction of the State court; but if the State court's construction denies the existence of the contract rights, the Supreme Court of the United States will review that construction. While of course no State court has construed the specific charter of the city or the specific ordinance contract in question, the Supreme Court of Alabama has construed a number of charters of Alabama cities similar to the charter of the City of Opelika here in question, and has construed and given effect to ordinances of such cities as the one here in question, and held that they did cre-

ate contractual obligations within the protection of the State and Federal Constitutions against impairing the obligation of contracts.

In the case of *Greenville v. Greenville Water Co.*, 125 Ala. 625-639, the charter of the City of Greenville, which was somewhat similar to the charter of the City of Opelika here in question, was construed, and the Supreme Court of Alabama held that, as a water supply was one of the necessities of a city, under the general authority to enact ordinances for the good order and welfare of the city granted to it, the City of Greenville had power to make proper contract for such water supply.

In the case of *Weller v. City of Gadsden*, 141 Ala. 642-656, the charter of Gadsden, which, for the purpose of this decision, was similar to that of Greenville and that of Opelika here in question, was construed, and the Supreme Court of Alabama, among other things, said:

"Whatever may be said as to the agreement to pay for hydrants at a fixed price for thirty years * * * it is settled that under a charter authorizing the city to make needful provisions to supply the city with water * * * its authorities may make such a contract, which will be valid, if not for the whole period, at least for a reasonable length of time," citing *Greenville v. Greenville, supra.*

In the case of *Mitchell v. Gadsden*, 145 Ala. 137, 157, the court construed the charter of the City of Gadsden and held that the city had the power to enter into a contract with a public utility; that case held that the making of such a contract between the city and the public utility was not delegation of governmental function, but was an exercise of its business

or proprietary power. The court further held in that case that it was one of the incidental powers of a municipal corporation to make such contracts with public utility companies for supplying water, and cited Dillon on Municipal Corporations, 4th Ed., 146, and *Livingston v. Pippin*, an old Alabama case reported in 31 Ala. 542.

Judge Dillon, in his latest edition on Municipal Corporations, 3rd Vol. 5th Ed., Section 1302, p. 2130, states the law to be that a city has authority to construct water, gas, or electric light works, whether it be derived from an express grant or from a general power of the city in respect to police regulations, preservation of public health, and concludes by saying: "Any power which is sufficient to authorize a city to provide a supply of water or light implies, in the absence of special restrictions, the power to make a contract with an individual or corporation therefor."

The case of *City of Bessemer v. Bessemer Water Works Co.*, 152 Ala. 391, construed the charter of the City of Bessemer, which is similar to the charter of the appellant City of Opelika, and those of the City of Gadsden and the City of Greenville above referred to, and the Supreme Court of Alabama held that the City of Bessemer had authority to contract for rates at which water should be supplied to its citizens for a definite period, and of consequence to suspend its charter powers in respect to the regulation of rates during such fixed periods. The Supreme Court said in that case that although the power was given the City of Bessemer to fix rates, that it was not an inhibition upon the city's power to contract for rates if that power to contract could be implied from express

power to contract for the supply of water, and the Supreme Court of Alabama held that the right of the city to fix maximum rates, if not expressly given, arose by necessary implication from the language with which the charter power to contract was clothed. The charter of the City of Bessemer authorized the city to make, erect or repair public mains, cisterns, hydrants, and to make all needful provisions by contract, ownership, or otherwise, for the supplying of its citizens with water.

In the case of *Birmingham Water Works Co. v. City of Birmingham,* reported in 211 Fed. 497, the District Court of the Northern Division of Alabama had under consideration the charter of the City of Birmingham, Alabama, and an ordinance of that City which fixed maximum rates which the water company could charge for the supply of water in the City of Birmingham. The charter of the city of Birmingham was not unlike the charter of the City of Opelika and those of other cities in Alabama which were created by special acts of the Legislature as to each city. While these charters of the various cities of Alabama above referred to are not identical, there is great similarity in all of them. Several of them are compared by Judge Grubb, of the District Court, in his opinion in the above styled cause. In that case Judge Grubb held that the charter powers of municipal corporations under the laws of the State creating them was a matter for the determination of State courts, which determination would be followed by the Federal court unless the construction of the State court conflicted with the proper enforcement of rights conferred, guaranteed, or protected by the laws of the United States; and, after reviewing many of the

decisions of the Supreme Court of Alabama construing the charters of municipalities very similar to the charter of the City of Opelika in question, Judge Grubb decided that where a municipal corporation was authorized to enact ordinances for the good order and welfare of the city, it was also authorized to contract with third persons or corporations to furnish water for the city or its inhabitants; and that where a city had entered into a contract with a water works company, held that the rates were valid and binding upon the city and the water works company for the period of thirty years prescribed in the ordinance granting a franchise and fixing the schedule of rates, and that where the city had contracted with the water company to furnish water at specified rates for thirty years, that a subsequent ordinance, modifying the original contract and establishing rates different from those originally specified, was void unless ratified by vote of the people, as authorized by the statute applicable to Birmingham. We recommend the opinion of Judge Grubb in this case to the consideration of this Court. It is a learned and convincing discussion of the rights and powers of municipal corporations in Alabama to make contracts with public utility companies as to rates to be charged by public utilities. It not only reviews the decisions of the Supreme Court of Alabama, but those of the Supreme Court of the United States; and holds that such contracts are valid unless prohibited by the Constitution or statutes of the State, declaring such contracts to be against the public policy.

The case of *Birmingham Water Works Co. v. City of Birmingham* was appealed from the District Court to the Circuit Court of Appeals and the decision was

affirmed, in 213 Fed. 450, by merely adopting the opinion of Judge Grubb in the District Court. The only material difference between that case and the case at bar is that in that case the contract was to supply water, and in this it is to supply sewer service, and in that case the city attempted to avoid the contract and declare the rates void, while here the public utility company seeks to avoid the contract and to declare the rates void.

The Alabama cases reviewed by Judge Grubb have since been followed and re-adopted by the Supreme Court of Alabama in the case of *Mobile Electric Co. v. City of Mobile,* reported in 201 Ala. 607. In that case the electric light company, like the sewer company in this case, claimed that the schedule of rates imposed and collected by the City of Mobile was so low as to be confiscatory, and the electric light company attempted by force to put in higher rates, as did the sewer company in this case. In the Mobile case, however, the City of Mobile anticipated the electric light company in its attempt, and it filed a bill in equity to enjoin the light company from establishing and adopting a new proposed schedule of rates for electric light service in Mobile; whereas, in this case the sewer company filed its bill to enjoin the city from continuing to collect the rates fixed by the ordinance franchise and contract and to compel the city and citizens to pay double the price originally proposed by the sewer company, as a new schedule of rates. In that case the Supreme Court of Alabama held that the City of Mobile had authority to contract for furnishing electricity to its inhabitants for a fixed and reasonable period at rates specified in the contract, and that such contract was protected under the inviolable

contract clauses of the State and Federal Constitutions, and that although the contract might provide that the rates should be perpetual, that such rates would be enforced during a period of thirty years, in analogy to Section 228 of the Constitution of Alabama, which limits the term of franchises to that period. The court also held that the city could maintain a bill to enjoin the electric company from increasing rates as to its citizens, notwithstanding the citizens could redress the wrong individually or collectively. Consequently, it appears that the decisions of the Supreme Court of Alabama are unanimous to the effect that a municipality may contract with a public utility to furnish the city and its inhabitants with water, light, gas, etc., and that such contracts are valid and binding both upon the city and the public utility for the period of time fixed in the contract, unless prohibited by the Constitution or the statutes, We submit that, if the City of Greenville and the City of Gadsden and the City of Bessemer and the City of Mobile and the City of Birmingham had authority, under their respective charters, to make a contract with a public utility, and in its contractual capacity to fix the rates or charges for such public service to the respective cities and the inhabitants thereof, then the City of Opelika had authority to pass the ordinance here in question and to fix the maximum schedule of rates which was fixed in the ordinance, and that the rates so fixed were contractual or agreed rates, and not law fixed rates, and that the fact that they might be confiscatory was unimportant, and consequently conferred no jurisdiction upon the District Court to declare them void or to compel the City of Opelika to approve other and different rates proposed by the Sewer Company. It

is true that none of the Alabama cases cited involved the question of the right of the city to provide for sewer service, but that each dealt with the right of the city to contract with public utilities for water, lights, or gas; but the same principle will apply to the right of the city, with similar charter provisions, to contract for sewer service and to agree upon rates or charges for such service, for, as was said by the Supreme Court of California, in *McBean v. Fresno,* 112 Calif. 159, 31 L. R. A. 794, 53 Am. St. Rep., 191, "Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to contract and maintain them had been granted by the charter, but, rather, only to see whether by possibility the power had been expressly denied." See, also, Pond on Public Utilities, Section 40. Moreover, Section 11 of the charter of the City of Opelika, as shown on page 59 of the record, and which is quoted by the trial judge in his opinion, as appears on page 77 of the record, expressly provides that the city should have power to establish and build drains, sewers, conduits, reservoirs, and to regulate the same and to authorize the use of the streets and to maintain the health and cleanliness of the city and to this end to adopt and maintain an efficient system of sewerage, and to adopt such ordinances and regulations as it might deem necessary or expedient for the protection of health and to maintain a good sanitary condition in public places and all private premises; so it is not necessary to resort to implied power. Here the city is given express power to do everything that it has done. It has been repeatedly held, by numerous courts and textwriters, that the grant to a municipality of the power to con-

tract or maintain a water, light, gas or sewerage system, necessarily carries with it the power to contract with individuals or corporations to provide the city and its inhabitants with water, light, gas, or sewerage systems. The right to contract with such person or corporation for such services of course necessarily implies the power to agree upon rates, tolls, or charges for such services.

We respectfully submit that counsel for the Sewer Company, and the trial court, have incorrectly construed the charter of the City of Opelika as well as the ordinance franchise which prescribes the schedule of rates complained of in this case. All of the authorities relied upon by counsel, and by the trial court, holding that such rates were void, were cases in which the municipality was exercising its legislative or governmental powers, and not where it was exercising its business or proprietary powers. The distinctions between the two lines of cases have been repeatedly pointed out, both by textwriters and by the courts; and consequently the fatal error into which counsel for the Sewer Company, and the trial court, have fallen, is that they have attempted to bring this case within the rule of those cases in which the municipality had fixed rates, while in the exercise of its legislative or governmental powers which were delegated to it by the Legislature, and have failed to assign the case made by the record to the class to which it in fact and law belongs,—that class of cases in which the municipality has contracted with individuals or corporations to furnish supplies of water, light, gas or sewer service, at agreed or contractual rates. These two classes of cases were well pointed out by Chief Justice White, in the case of *Southern Electric Co. v. Chariton*, and

other similar cases reported in 65 L. Ed., p. 764, and 255 U. S. 539. In that case the Chief Justice said:

"Where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial," citing a great number of cases, among which is the case of *Columbus Railway Power & Light Co. v. Columbus*, 249 U. S. 399, 39 S. C. Rep., p. 349. In that last case the opinion was written by the lamented Mr. Justice Day, and it was there decided that where the ordinance of Columbus granted the street railway a franchise for a fixed term of years and it was accepted by the grantee, that it constituted a binding contract, the obligation of which the company could not avoid on the ground that the increased operating expenses, due to the war and higher wages fixed by the War Labor Board, made it unprofitable. The argument of the railway company in that case was identical with the argument of the Sewer Company in this case. Justice Day says:

"The theory upon which the bill was framed, and the case argued here by appellant, is that the grants were legislative in character, and gave to the Railway Company the right and privilege of using the streets of the City for a period of twenty-five years; that to compel their operation at unremunerative rates is to take the property of the Company without due process of law in violation of the Fourteenth Amendment. The insistence on the part of the City is that under the controlling laws of Ohio, in force when

these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the City, which had authority from the State for that purpose, to permit the operation by the Company upon the streets of the City for the period of twenty-five years upon the terms and conditions set forth in the ordinances."

This is a good statement of the facts in this case, *mutatis mutandis*. Justice Day, in answering these respective contentions, said:

"That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court, citing *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, adding "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question," and concluded that the ordinances did constitute a contract under the laws of Ohio. We have cited a number of cases showing construction of the Alabama statutes to the effect that such ordinances, under the laws of Alabama constituted a contract. After stating the contention of the public utility that the ordinances did not constitute a contract, but were legislative in their character so far as they fixed rates, and after discussing the insistence that the contract had become too onerous for the public utility to perform it unless the rates were increased, Justice Day said:

"It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation pos-

sible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."

In the case of *Day v. United States,* 246 U. S. 159, it is said:

"One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking."

It was claimed in the case of *Columbus Railway, Power & Light Co. v. City of Columbus, supra,* that the happening of subsequent events, the world war, and the great increase in wages by the arbitral award of the War Labor Board relieved the utility from performing the contract at the agreed rates; but this contention was denied effect.

Counsel for the Sewer Company in the court below —and we suppose they will again in this court—relied upon the case of *San Antonio v. San Antonio Public Service Company,* 255 U. S. 647, 65 L. Ed. 777, 41 S. C. Rep. 428. The trial court also cited and relied upon it in holding that the ordinance franchise contract in this case was void because in violation of Section 22 of the Constitution of Alabama. That case is not and ought not to be made an authority in this case, for the reason that the facts in the two cases are entirely different. If the City of Opelika in this case, in passing the franchise ordinance here in question, had been exercising its governmental or legislative powers in fixing rates for public utilities, then we concede that the case of

San Antonio v. San Antonio Public Service Co., 255 U. S. 647, 65 L. Ed. 777, 41 S. C. Rep. 428, would be an authority to support the decision of the trial court in this case; but, as the City of Opelika, in this case, in passing the ordinance franchise in question, was acting in its private, business or proprietary capacity, and not in its governmental capacity, the above case cannot and ought not to apply or control the decision in this case. We submit that the facts in that case showed as conclusively that the City of San Antonio was exercising its governmental or rate making power in passing the ordinance there in question, as it is clearly shown in this case that the City of Opelika was exercising its private, business or proprietary power in passing the ordinance franchise in this case. The opinion of Chief Justice White in the San Antonio case clearly and repeatedly makes the case turn upon the question as to whether or not the City of San Antonio was exercising its governmental power in fixing rates, or whether it was exercising its private, business proprietary power in contracting for rates. In fact, he says: "Was the ordinance of 1899, fixing the five cent rate, a contract?" The opinion held in effect that if it was a contract it was binding upon the public utility, and if it was not a contract, but was an ordinance fixing rates, then it was not binding upon the utility, and consequently the duty rested upon the City of San Antonio to fix reasonable rates in excess of the five cent fare. Chief Justice White in his opinion in that case makes it clear, certain and beyond doubt that the ordinance there in question was an exercise of the city's governmental or law making power, and not a private or business capacity. In that case the ordinance in question expressly provided that the

city "shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants." As pointed out by Chief Justice White in the opinion in that case, it had theretofore been decided that the rate then in question was not a contract rate, and that it could be modified by the city. Likewise, there was no question in that case—in fact, it was not disputed—that the State of Texas had conferred upon the City of San Antonio the right to fix rates and charges for public utilities.

Let us compare and contrast the facts in this case with the facts in that case. Here the State of Alabama has never conferred upon the City of Opelika the power to fix rates or charges as for any public utility, sewer company or others. At the time the contract ordinance here in question was passed there was no occasion to fix rates for sewer service. There was no public service sewer company. The ordinance here in question was nothing but a contract between the city and the public utility company to provide a sewer system for the City of Opelika and its inhabitants. The schedule of rates in question was proposed by the Sewer Company, accepted or agreed to by the City, and written into the ordinance, and the ordinance was accepted in writing by the Sewer Company after it was ordained and passed. It has none of the earmarks of a law; but has all the earmarks of a contract. The ordinance speaks of itself as a contract. It recites that the company accepts it as a contract. It provides that the City shall aid the Company in the enforcement of it as a contract. It

even provides the conditions and mode of forfeiture as a contract. There is never an intimation in it that either the city or the company had the power to change the rates. It even gave the city an option to purchase the plant and take over the whole works after ten years. Not a single one of these contract provisions are to be found in the San Antonio ordinance; but as before stated, the ordinance itself expressly provides that the city has power to change or regulate the rates and charges. We concede, of course, that if the facts in this case were the same or even similar to the facts in the San Antonio case, the decision of the trial court would be correct, and that we would have no standing in this court on appeal; but we insist and we believe that the records in the two cases show without dispute that the facts are entirely different, in that the rates in the San Antonio case were law fixed rates, whereas in this case they are contract fixed rates. The authorities in the two lines of cases, one, where the rates are fixed by law, and another, where they are fixed by contract, are collected in a note to the case of *Columbus Ry. Co. v. City of Columbus*, 249 U. S. 399, 63 L. Ed. 669, 39 S. C. Rep. 349, reported in 6th Am. St. Rep., p. 1649.

We submit that the authorities, both textbook and adjudicated cases, have settled the law to the effect that a municipality, in the absence of any direct action by the State, may enter into a contract with a public utility whereby the rates to be charged are fixed and become a contract as between the parties and which is binding upon both parties, but notwithstanding this the State has power, which it may delegate, to increase or diminish such rates whenever public necessity demands it. In other words, franchise rate contracts are

not such contracts as may not be increased by the State without infringing the constitutional guaranty. Such franchise contract must be deemed to have been entered into with a knowledge of the inherent and reserved power of the State to alter such contract when necessary so to do for the public welfare; and municipalities are merely agents of the State, and the State may at any time waive the rights of the municipality in the contract. Such contract rates, however, between a municipality and a public utility are binding on both parties until changed by the State, acting through its legislature or through some delegated power. We submit that it has been uniformly held by the State and Federal authorities that where a valid contract exists between a public utility company and a municipality for the furnishing of a stipulated service at a stipulated price, the public utility cannot be released of the obligations of the contract and the rates increased because of the changed conditions existing at the present time rendering the performance unprofitable.

In the case of *Muscatine Lighting Co. v. Muscatine*, 256 Fed. 929, the court said:

"It must be apparent that if the confiscatory rate is fixed not by the municipality but by the utility company (and such is the case here) the State has done no act depriving the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate (and such is the case here) it has waived the constitutional rights which it might otherwise assert." The court also said in the Muscatine case that if a rate was fixed by agreement which, at the time, was reasonable, but which af-

terwards became confiscatory without any act of the State, but simply as the result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the State is not violated; that so far as the income and profits of a utility corporation are concerned, where the rates are fixed by contract and not by law, the utility company was in the same position as a building corporation or a state improvement company. The court said: "It may make money; it may lose money. *But only when the State has acted affirmatively to the deprivation of reasonable income upon actual investment can constitutional guaranty be invoked.*" (Italics ours). If a rate of a utility company is fixed by contract between it and a municipality, so far as the parties to the contract are concerned the positions of the parties are not different from that of other contractors who have agreed to supply articles the cost of which has been greatly enhanced by war or industrial conditions. A utility company in such case is bound by the contract just as any other contractor, though performance results in loss.—*Berg. v. Erickson,* 234 Fed. 817, L. R. A. 1917A 648. In the last case Judge Sanborn says that in some of the State courts a rule had been developed that when conditions arise of such character that the court can see that they were not within the contemplation of the parties, such a change of situation will excuse the violation of the contract; but the judge said: "But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court which must prevail here is otherwise." He concludes by saying that "the question has been directly passed upon and contracts much more

inequitable than the one here involved were reviewed in the following cases," citing *Rutland Marble Co. v. Ripley*, 10 Wall. 339; *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459; *Guffey v. Smith*, 237 U. S. 101. It has been decided by the State and Federal Courts that in determining whether equitable relief should be granted with respect to contracts between utility companies and municipal corporations as to rates and charges, the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair and free from fraud, mistake or imposition, parties must be left free to make their contracts, and it is the duty of the court to enforce them as made.

Argue this case as we may, it finally comes back to the question whether or not the ordinance franchise which granted the Sewer Company the right to construct and operate a sewer system in Opelika, and which contained the schedule of rates here in question, was a valid contract between the City of Opelika and the Sewer Company. If it is a valid contract, and we insist and believe we have shown that it is, then there is no equity in the bill of the Sewer Company and the prohibition of the Fourteenth Amendment upon the State is not violated. On the other hand, if this ordinance franchise was not a contract, but was a law fixed rate or regulation for sewer service in the City of Opelika, and there is equity in the bill, and if the rates are confiscatory the decree of the court is correct. We believe that we have demonstrated that the ordinance is nothing but a contract between the City and the Sewer Company; that the schedule of rates contained therein is a part of the con-

sideration of the contract; and that the rates are binding upon the Sewer Company, and that the mere fact that, because of industrial conditions, the rates are not remunerative, gives equity no jurisdiction to grant relief and that no Federal question is involved, for the reason that the prohibition of the Fourteenth Amendment insisted upon is not violated. We believe that this is shown by reason of the following facts and principles of law which we insist are not disputed: that rate making is a sovereign power; that municipalities are not presumed to possess this power; that the power must either expressly or by clear implication be conferred by the legislature; that the charter of the City of Opelika does not confer, either expressly or by clear implication, any power upon the municipality to fix rates, but that it does authorize the city to contract for sewer service, which includes the power to agree upon rates.

We have cited several decisions of the Supreme Court of Alabama which construed charter provisions similar to those contained in the charter of the City of Opelika, and that construed franchise ordinances similar to the one here in question; and in every instance the Supreme Court of Alabama has held that the franchise ordinance there in question was a valid contract between the municipality and the public utility then in question. The Federal Court, in an opinion written by Judge Grubb in the case of *Birmingham Water Works Co. v. City of Birmingham*, 211 Fed. 497, reviewed the Alabama decisions and concurred in the correctness of those decisions and followed them. His opinion was affirmed by the Circuit Court of Appeals in 213 Fed. 450. We submit that the Supreme Court of the United States, construing similar charters of

statutory provisions regulating municipalities and similar ordinances granting franchises to public utilities, has held that franchise ordinances like the one in question are valid and enforceable contracts between the municipalities and public utilities, and the mere fact that the rates, on account of industrial conditions, may become unremunerative, or even confiscatory, does not give equity jurisdiction to relieve against them, and that a bill seeking to relieve the utility company from the enforcement of such contract rates presents no Federal question. Not a single case cited or relied upon by counsel for the Sewer Company in the court below, and not a single one cited or relied upon by the trial court in his opinion, is applicable or ought to control in this case if the ordinance franchise here in question was a valid contract between the parties. Such cases so cited and relied upon by counsel for the Sewer Company and by the court are applicable and are applicable only in the event that the rates mentioned in the ordinance franchise in question are law fixed rates. Consequently, as stated above, the correct decision of this case must depend upon a construction of the franchise ordinance here in question. If the schedule of rates mentioned in that ordinance is contractual and the contract is valid, then there is no equity in this bill. On the other hand, if they are law fixed rates, and such rates are confiscatory, then there is equity in the bill and the decree of the trial court is correct. We insist, however, that the bill in this case, on its face, fails to show that the rates in question are law fixed rates. It fails for the reason that it does not show by express allegation or by necessary inference that the City of Opelika has ever had conferred upon it the sovereign or legislative power

to fix rates. We insist that the bill utterly fails to show any attempt on the part of the city to exercise the sovereign right or power of fixing rates for public utility companies. We insist that the allegations of the bill, considered in connection with the exhibits thereto, including the ordinance franchise in question, affirmatively and conclusively show that the rates complained of were contractual, and hence there was not equity in the bill.

If the schedule of rates fixed for sewer service in this case is inadequate, and is, as matter of fact, confiscatory, it is evidently due to a change of circumstances and conditions for which the City of Opelika is no more responsible than is the Sewer Company. Surely it will not be contended that this schedule of rates was too low, or was confiscatory, when it was established, for the reason that the schedule was made out by the Sewer Company itself. They were rates which were first proposed by the Sewer Company; and it did install and operate the sewer plant in accordance with the ordinance contract in consideration of the payment of the schedule of charges fixed. Such rates were agreed to by the City and were incorporated in the ordinance and the ordinance was formally accepted in writing by the Sewer Company; and consequently it became a binding contract, as much so as any contract could ever become binding upon the parties. If the costs of labor and material should have decreased during the life of this contract, rather than increased, the Sewer Company would never have made any complaint. The fact that the rates were not confiscatory or too low when established is conclusively shown by the fact that the Sewer Company has operated under the schedule for nineteen years, and it

operated under it for eighteen years without complaint. If the allegations of the bill, that the Sewer Company is operating at a loss, be true, it must bear the loss or forfeit its charter by failing to perform the duties and conditions imposed upon it by the contract. In fact, such forfeiture is expressly provided for in the ordinance and is a part of the contract. Consequently, its remedy and relief from its present condition is provided for in the contract.

It is possibly proper for us to say in this brief that prior to the present Constitution of Alabama, that of 1901, most of the towns, cities, and municipalities in Alabama were incorporated under and by virtue of special acts of the Legislature, which incorporated the municipality and conferred upon it all of its rights and powers and granted it all of its privileges and immunities and imposed upon it all of the duties. Since the Constitution of 1901, municipal corporations are now incorporated under general laws, special laws creating such municipalities being prohibited for the first time by the Constitution of 1901; but the Constitution of 1901 did not have the effect of destroying the charters of existing municipalities which were created by special act, but they were continued in existence, with provisions that the charter could be amended under general laws to be provided thereafter. It is not contended that there are any general laws of this State which in any manner influence or control the correct decision in this case. The special act of the Legislature of Alabama, which is set out at length in the record in this case, is the sole law of Alabama, save the provisions of the Constitution of Alabama, and those of the Constitution of the United States, which can and should control or affect the correct de-

cision in this case. We contend and believe that an examination of the charter of the City of Opelika, together with the ordinance granting the franchise to the Sewer Company, will convince the court that the rates the enforcement of which the Sewer Company seeks to enjoin, are contractual and agreed rates and not law fixed rates; that the City of Opelika, in fixing or agreeing to such rates, was exercising its business or proprietary power, and not its legislative or governmental power; and that consequently the question as to whether the rates are confiscatory or not is wholly immaterial. If we be correct in this conclusion, then the trial court acquired no jurisdiction, for the reason that no Federal question was involved; there was no equity in the bill of complaint, and the case presented no equitable cause of action; and the decree of the lower court should be reversed and a decree here rendered dismissing the bill at the costs of appellee.

Respectfully submitted,

City of Opelik
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No. 524. October Term, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF OPELIKA,

Appellant,

vs.

OPELIKA SEWER COMPANY,

Appellee.

Appeal from the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLEE.

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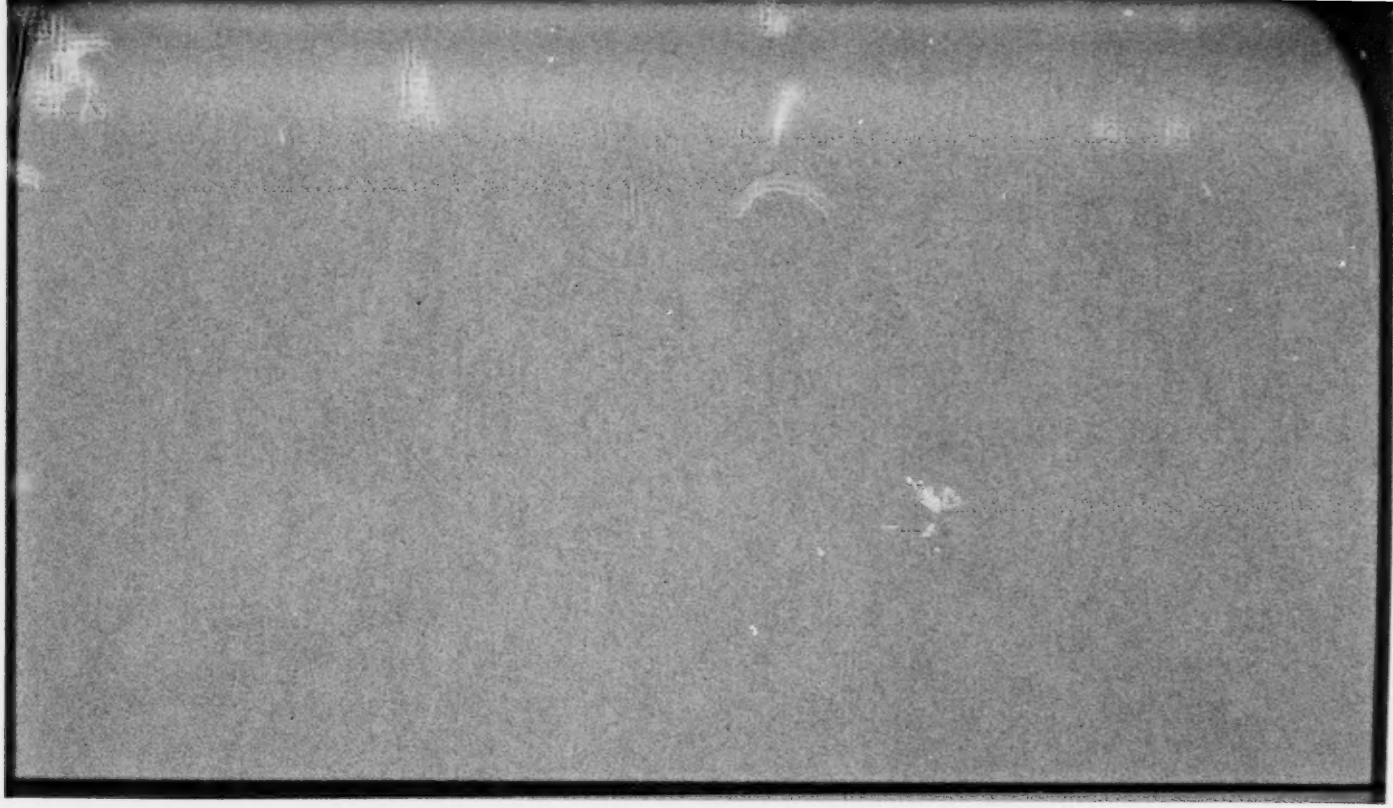

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IN THE

Supreme Court of the United States

October Term, 1923. No. 524.

CITY OF OPELIKA,
Appellant,

vs.

OPELIKA SEWER COMPANY,
Appellee,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal by the City of Opelika from the Decree of the District Court granting an injunction against the City restraining it from enforcing the rates for sewer service specified in the ordinances of said City adopted November 19, 1901, amended April 22, 1902, granting a franchise to the Company to construct, operate and maintain a sanitary sewerage system in said

City for a period of thirty years, and Section 6 thereof provided that the sewer Company was "authorized to charge not in excess of the following annual rates for sewerage service, which said rates may be collected quarterly in advance", following which is a schedule of maximum rates (Record, pp. 6-12). The Appellee Sewer Company thereafter constructed and has since operated and maintained a sewerage system serving said city and its inhabitants charging the rates specified in the ordinance until January 1, 1922, resulting in a loss, the actual operating expenses greatly exceeding the gross receipts, although the system was managed and operated as economically as possible. The Company has been unable to pay the interest on its bonded indebtedness or to earn any dividends on its actual cash investment of $70,000 or on its capital stock of $50,000. In the suit brought by the appellee Company it was shown and not seriously denied by appellant that the rates prescribed in the ordinance of April, 1902, were confiscatory because inadequate for a fair return upon the reasonable value of the property employed in the service and that if compelled to continue the service under the rates named in the ordinance it would result in the taking of appellee's property without just compensation in violation of the Fourteenth Amendment of the Constitution of the United States. It further appeared that the appellee on November 23rd, 1921 (Record, p. 13) petitioned the City for permission to increase its rates so as to provide for a revenue commensurate with the service and to insure a fair return upon the Company's property, and set forth a schedule of new rates, which permission was denied by the City and the Company thereupon promulgated and put into effect the new rates alleged to be fair and reasonable to the City and its

inhabitants and necessary to the continued operation of the sewerage Company.

A special Master was appointed to take testimony as to whether or not the rates or charges were so low as to be confiscatory and he reported to the Court that the rates were confiscatory, which report was confirmed by the Court.

The appellant city contended that the franchise ordinance of April, 1902, constituted a valid and binding contract and that the rates therein stipulated cannot be changed without its consent.

The appellee company contended that the ordinance does not constitute a contract in so far as it relates to the rates for the reason that the city had no charter power to fix irrevocable rates by contract and even if the Legislature had granted such power, such grant is in conflict with Section 22 of the Constitution of Alabama, and therefore ineffective.

The argument of appellant on this appeal is based upon the same contention as in the Court below, to wit, that the franchise ordinance constituted a valid contract and the fact that the specified rates are confiscatory is not questioned. The City's sole contention is that the rates were fixed by contract and are therefore binding upon both parties for the entire term. The facts are clearly summarized in the opinion of the Court below reported in 280 Fed. 155 (Record, p. 75).

ARGUMENT.

The sole question involved is whether the City had the power to fix irrevocable rates by contract. On behalf of the appellee company it is contended that the franchise ordinance of 1901 did not constitute a contract between the city and the company in so far as it relates to the rates for sewerage service for the reason that:

(1) The City had no power to fix irrevocable rates by contract, and

(2) Even if the Legislature had attempted to grant such power, same would be ineffective because in violation of Section 22 of the Constitution of Alabama, as follows:

> "That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."

(1) The City had no power to fix irrevocable rates by contract.

Appellant's argument is based upon the theory that in granting the franchise to the appellee to construct and operate a sewer system and specifying the maximum rates, that the city was not acting in its governmental capacity, but in its private business capacity and argues that it could not have been acting in its governmental capacity because it has no power conferred upon it by the state to regulate rates. Appellant then assumes from such alleged lack of power that the city must have had the power to contract for irrevocable rates. The charter expressly grants to the city the power to establish and build sewers and regulate the same, which clearly includes the power to grant the franchise to a public utility company and to regulate the rates, but even if no express power to regulate rates is granted, it is manifest that to contract for irrevocable rates and thus surrender the police power to regulate for the benefit of the public cannot be inferred merely from the absence of an

express grant of power to regulate. Appellant city would have it appear that because the city may have no express grant of power to regulate rates in its governmental capacity that therefore it has absolute power to fix irrevocable rates by contract in its private business capacity. The fallacy of this argument is apparent and begs the entire question.

Furthermore the city in exercising the power granted in its charter to establish and build sewers and regulate same, and to maintain the health and cleanliness of the city and to this end to adopt and maintain an efficient system of sewerage, was clearly acting in its governmental capacity for the protection of the health of its inhabitants—exercising an express governmental power as provided in its charter.

The distinction is well established between the responsibility of cities for acts done in their public or governmental capacity and in the discharge of duties imposed on them by the Legislature for public benefit, and for acts done in what may be called their private or business character in the management of property and rights voluntarily held both for their own immediate profit or as a corporation although inuring, of course, ultimately to the benefit of the public.

1 Dillon's Municipal Corporations, 5th Ed. Sec. 109, and cases cited.

There can be no doubt that any exercise of the powers granted in its charter to provide an efficient sewerage system for the public benefit and protection of the health of its inhabitants, the City acted in its governmental capacity. 28 CYC, 267.

The preservation of the public health is uniformly recognized as one of the chief functions for the exercise of the police power, and is a most important municipal

function, and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality. 28 CYC. 709.

The distinction between the governmental function and the corporate or private business capacity of a municipality has frequently arisen in cases seeking to impose liability on a municipality for injuries caused in the exercise of such powers, and in the case of alleged liability from the operation of a sewer system, it is held that the city is not liable because of the negligent or careless manner in which it maintains its sewer system as the construction and maintenance of such system so far as concerns the general community at large is a governmental function, and in the absence of a violation or invasion of a property or contract right, no recovery can be had against the city.

4 Dillon on Municipal Corporations, 5th Ed., Sec. 1744, citing and quoting from Hughes vs. Auburn, 161 N. Y. 96, and many other cases.

A municipality is not liable for injuries in connection with sanitary regulations for the protection of the public health, as same is the exercise of a governmental or legislative function.

HOWARD vs. PHILADELPHIA, 250 Pa. 184 (1915).

This principle has been so long and so firmly established in our general municipal corporation law as to cause astonishment that it should even be raised at this late day save only to meet the exigency of an otherwise weak case.

The City charter is contained in the Act of the Legislature of Alabama approved February 20, 1899, (Record, pages 52 to 70), and provides that the City shall have full power and authority to "maintain the

health and cleanliness of the City, and to this end to adopt and maintain an efficient system of sewerage; to adopt such ordinances and regulations as the Board may deem necessary and expedient for the protection of health and to maintain a good sanitary condition in public places and on private premises in the City" (Record, p. 59), "to establish and build drains, sewers, acqueducts and reservoirs and to regulate the same," (Record, p. 60) and to "authorize the use of the streets of the city for horse, steam or electric railroads, and to regulate the same, and to attach conditions to any grant of franchises, and to compel such companies to have and keep in repair such parts of the streets, bridges and crossings over which their cars run, as the board may deem proper; to regulate the use of the street for erection of telegraph, telephone, electric and all other systems of wires and conduits, and to require same to be placed underground if deemed necessary for public convenience or safety".

These are the only powers relating to this subject which the Legislature granted or attempted to grant in the City charter and no other statutes are applicable thereto.

The well established rule is that if the rates fixed in a statute or ordinance are so inadequate that their enforcement would be equivalent to the taking of property for public use without just compensation to the owner they should not be observed because there must be afforded a fair return from the property at the time of its use for the public benefit.

NEWTON vs. CONSOLIDATED GAS CO., 258 U. S. 165, 66 L. Ed. 538.

KNOXVILLE vs. WATER CO., 212 U. S. p. 1, 53 L. Ed. 371.

WILCOX vs. CONSOLIDATED GAS CO., 212 U. S. 19, 53 L. Ed. 382.

DES MOINES GAS CO. vs. DES MOINES, 238 U. S. 153, 59 L. Ed. 1244.
DENVER vs. DENVER UNION WATER CO., 246 U. S. 178, 62 L. Ed. 649.
LINCOLN CAR CO. vs. LINCOLN, 250 U. S. 256, 63 L. Ed. 968.

In HOME TELEPHONE CO. vs. LOS ANGELES, 211 U. S. 265, 53 L. Ed. 176; it appeared that a franchise for fifty years was granted by an ordinance stipulating for certain free telephone service to the city and that charges for service should not exceed certain specified amounts. The City attempted to reduce the rates which the Company claimed could not be done without its consent as the ordinance constituted a valid contract and to change the rates would impair the obligation thereof in violation of the Federal Constitution. It was held that the City did not have the power to enter into a contract fixing unalterably during the term of the franchise the charges for telephone service. This Court in an opinion by Mr. Justice Moody said:

> "This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter 'power of regulation'? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the au-

thority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in cert in well-defined cases it may be made legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this Court, which will be referred to hereafter.

It has been settled by this Court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' Street R. Xo., 184 U. S. 368, 382, 46 L. Ed. 592, 605, 22 Sup. Ct. Rep. 410; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508, 51 L. Ed. 1155, 1160, 27 Sup. Ct. Rep. 762. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, 955."

Later, in applying the rule thus expressed as to power to fix street railway rates in Milwaukee Electric Railway vs. Railroad Commission, 238 U. S. 174, 59

L. Ed. 1254, it was held the power to establish prices to be charged by public service corporations is a governmental power and is interpreted as continuing in nature and incapable of being bartered away. The settled federal rule is exacting and need not be misunderstood. It requires that the intent of the statute to authorize a municipality to exercise such power *by contract* must appear in explicit and convincing terms. In that case, Mr. Justice Day said:

> "It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evinced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

In KNOXVILLE WATER CO. vs. KNOXVILLE, 189 U. S. 434, 47 L. Ed. 887, the water company was granted a franchise to erect water works and supply the city with water for thirty years, provision being made for certain specified maximum rates. Some years later the city passed an ordinance reducing rates which the Company declined to accept and the city brought an action to recover penalty for charging and collecting rates in excess of those fixed by the later ordinance, which involved the question whether the old rates could be reduced. It was held that the power of a municipality to enter into an irrevocable contract fixing rates to be charged by a water company in effect removed same from the supervision of the police power and in order to do so there is no question but that the legislative grant of power must be unquestionable and admit of no other construction, but must be plain, positive and unequivocal.

In the case at bar the charter of the City of Opelika contains no grant of power to fix irrevocable rates and no other legislative provision appears which grants

any such power to the city, and under the above authorities, same cannot be implied, but must be plain, positive and unequivocal. Under the powers granted in the charter the city could build and maintain a sewerage system which, of course, included the right to grant a franchise so to do to the appellee company, but the city had no power to fix the rates irrevocably and the schedule of rates therein specified were subject to regulation and the sovereign power so to do was never surrendered or suspended.

Appellant in attempting to show the alleged power of the city to contract for irrevocable rates relies on the case of Detroit vs. Detroit Street Railway Co., 184 U. S. 368, 46 L. Ed. 592; and Cleveland vs. Cleveland Street Railway Company, 194 U. S. 517, 48 L. Ed. 1102.

In the Detroit case the Railway Company could not construct a railway through the streets of the city without the consent of the municipality which was empowered to make such regulations and impose terms and conditions for so doing upon the railway company. It appeared, however, that the power of the city to fix the rates by contract was expressly granted by the Street Railway Act which provided that the rates of fare which any street railway may charge for the transportation of passengers over its road should be established *by agreement* between the company and the corporate authorities of the city where the road is located and should not be increased without the consent of such authorities. Express power was thus granted the city to fix the rates by agreement or contract.

In Cleveland case the statutes of Ohio required written application to be made by the railway company for leave to construct and operate a street rail-

road, etc., and then provide that no street railroad grant shall be made except to the corporation *that will agree* to carry passengers upon such proposed railroad at the lowest rates of fare for a period of twenty-five years. It was held that this granted power to the city to fix the rates of fare by contract. Therefore, those cases are clearly distinguished for the reason that the power which is lacking in the case at bar was expressly granted to the cities in these cases.

Appellant also places great reliance upon and quotes extensively from the decision of this Court in COLUMBUS RAILWAY & LIGHTING CO. vs. COLUMBUS, 249 U. S. 399; 63 L. Ed. 669 (1919), where the Railway Company sought to be relieved from the provisions of a franchise ordinance granting it the right to operate a street railway for twenty-five years at certain specified rates of fare which the company alleged had become insufficient to provide a fair return on its property and hence confiscatory due to extraordinary war conditions. The city contended that the ordinance created a binding contract and that the Company was bound to furnish at the rate of fare fixed and had failed to show that the conditions amounted to a legal impossibility of performance of such contract. This contention was sustained by this Court and it was held that the franchise ordinance constituted a valid contract, but the decision depended and rested entirely upon the statutes of Ohio, which granted express power to cities to so contract, being the same statutes which ruled the Cleveland case (supra). These statutes provided that street railway grants should only be made by cities to companies that would agree to carry passengers at the lowest rates of fare, for a period of 25 years. This situation

is clearly stated by this Court in its opinion by Mr. Justice Day, as follows:

> "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question.
>
> It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this Court in Cleveland v. Cleveland City R. Co., 194 U. S. 517; 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the Court."

and then proceeds to discuss the Cleveland case.

Of course, in the case at bar no such statutory provision exists and no such power was vested in the municipality and in none of those cases did the Constitution of the State contain a prohibition such as that in the Constitution of Alabama forbidding the grant of irrevocable franchises and privileges. Can it be doubted that even if the Legislature had passed a law in Alabama similar to the Ohio statutes which ruled the above cases, that same would have violated Section 22 of the Alabama Constitution?

Appellant quotes at length and seemingly relies a great deal on the case of MUSCATINE LIGHTING CO. v. MUSCATINE, 256 Fed. 929 (D. C. Iowa, 1919), having entirely overlooked the fact that this case was argued on appeal with the case of the Southern Iowa Electric Co. vs. Chariton, and the decision of the District Court reversed by this Court upon the precise point in 255 U. S. 539; 65 L. Ed. 764; both of which cases will be referred to hereafter as absolutely sustaining our contention that the attempt on the part

of the City of Opelika to fix irrevocable rates in this franchise ordinance is in violation of Section 22 of the Alabama Constitution.

Appellant also relies on the case of BIRMINGHAM WATERWORKS CO. v. BIRMINGHAM, 211 Fed. 497 (D. C. Ala. 1913), and seeks to apply the ruling there made in reference to the Charter of the City of Birmingham to also govern the Charter of Opelika in the present case. The City Charter in that case empowered the City to make any needful provisions for the water supply and the Court finally reached the conclusion that the power to contract should be implied therefrom, together with the power to contract for rates. The alleged contract was attacked on the ground that the rates fixed were so low as to be confiscatory and in violation of the Fourteenth Amendment to the Federal Constitution, and also that the ordinance impaired the obligation of such contract. However, the first ground was not stressed and the Court expressly held that there had not been sufficient presentation of that phase of the case to justify a ruling thereon. Furthermore, the franchise was granted for a period of thirty years under Section 228 of the Constitution of Alabama which permits franchises for such period by cities of over 6000 inhabitants. This can have no application whatever to the City of Opelika as admittedly it has less than 6000 inhabitants. It further appears that Section 22 of the Constitution prohibiting any irrevocable grants was not referred to or considered by the Court. In addition, this case was decided in 1913, long before the changed condition of affairs due to the World War had brought about so many later decisions of this Court upon this subject referred to in this brief. In view of these facts, especially the failure to discuss or apply Section 22 of the

Constitution of Alabama, this case can have but little if any bearing upon the present discussion.

In KNOXVILLE GAS CO. vs. KNOXVILLE, 261 Fed. 283 (C. C. A. Tenn. 1919), the situation was almost identical with the case at bar, the controlling question being whether the city possessed the power by contract irrevocably to fix the maximum price for gas for a term of fifty years. Authority to make price by contract or even by way of regulation touching the supply of gas was nowhere expressed among the municipal powers, and the claim of power in the city to agree upon a price for gas rested chiefly on the right created in the city in general language to impose terms and conditions for its consent to the use of the highways, rather than upon any language expressly authorizing it either to regulate prices or to agree upon a price. After a full review of the authorities it was held that the power to fix rates to be charged by the public service corporations was governmental and resides primarily in the State and municipalities cannot exercise such power unless the State has in fact surrendered its power in that behalf. It is the settled Federal rule that a State surrender to a municipality of power irrevocably to fix rates for a public service corporation must appear in express and convincing terms; all doubtful expressions are to be resolved in favor of the State against the surrender of the power. No such power being delegated to the city, hence the franchise ordinance specifying the rate cannot in that respect be enforced by the city when by reason of changed conditions such rate was not compensatory, and the Gas Company was granted an injunction restraining the city from the enforcement of such rates.

We submit therefore that under these authorities and the admitted facts it is beyond question that the

City of Opelika wholly lacked the power to fix irrevocable rates by contract for sewerage service and that the ordinance in question did not and could not constitute a binding contract as to rates. And this is so even without reference to the prohibition of the Constitution of Alabama which removes all doubt if any could exist, and renders any such attempt to fix irrevocable rates nugatory.

(2) Had the power to fix rates by contract been expressly granted to the City it would be ineffective as in violation of Section 22 of the Constitution of Alabama, as follows:

> **"That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."**

Under this provision of the Alabama Constitution neither the Legislature nor its creature, the City of Opelika, could make any irrevocable or exclusive grants of special privileges or immunities, and even if the charter of the city had contained an express grant authorizing the city to fix rates irrevocably, any attempted exercise of such power, as the city now contends was done in the franchise ordinance here involved, would have been in violation of the constitutional provision and null and void. The Supreme Court of Alabama in discussing this provision held that this power can neither be abdicated nor bargained away, and it is inalienable even by express grant, and all franchises and property rights are held subject to its fair exercise. The municipality cannot in the exer-

cise of its delegated contractual right, perpetually or for an unreasonable length of time, fasten on the inhabitants rates and obligations that cannot be changed or regulated so as to meet changed conditions and thereby avoid extortion and oppression.

Referring to Section 22 of the Constitution, Judge Clayton, in his opinion in this case in the Court below, at page 160, 280 Fed., said:

> "If, however, the Legislature had granted or attempted to grant such power to the municipality as here claimed, manifestly, its act would have been in violation of Section 22 of the Constitution of Alabama, which provides:
>
> 'That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.' "

The language employed in this provision of the fundamental law of the State is comprehensive, and its purpose as well as its meaning is plain. The Supreme Court of Alabama in discussing this provision, intimated, in some of its decisions, that legislative power might be granted to contract for fixed rates for a reasonable period, but in City of Mobile v. Mobile Electric Co., 203 Ala. 574, 84 South. 816, considering the power to make grants and contracts of this character, declared that:

> "This power can neither be abdicated nor bargained away, and it is inalienable, even by express grant; that all contracts and property rights are held subject to its fair exercise."

In the former appeal of this case, 201 Ala. 607, 79 South. 39, L. R. A. 1918F, 667, the Court said:

> "The municipality cannot, in the exercise of its delegated contractual right, perpetually or for an unreasonable time fasten upon the taxpayers and inhabitants rates and obligations that cannot be changed or regulated during reasonable intervals so as to meet changed conditions and thereby avoid extortion or oppression."

BIRMINGHAM COMPANY vs. BIRMINGHAM, 79 Ala. 465.

There the Supreme Court of Alabama so construed Section 23 of the Constitution of 1875, a companion of Section 22 of the present Constitution, and it was held that neither the Charter of the City of Birmingham nor the general statutes conferred on that corporation the power to grant by ordinance in the nature of a contract the exclusive franchise in perpetuity for running a street railway through certain of the streets and avenues of the city and that if any such power was granted by the charter or any statute that it would be a violation of that constitutional provision against the passage of any law making any irrevocable grant of any special privileges or immunities. In the case of New Decatur v. Telephone Co., 176 Ala., at page 497 (1912), the Court says: "In our Constitution of 1875 there was added to the section (now Section 22, Constitution 1901) that no ex post facto law nor any law impairing the obligations of contracts shall be passed, this additional clause "or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly." This being a prohibitive law on the power of the Legislature, necessarily carries with it a like prohibition as to the law-

making power of every municipal corporation, the creature of the Legislature. Subsequent to the adoption of said Constitution every ordinance of a municipal corporation in the exercise of its legislative powers, must be construed as if that section of the Constitution was written into it."

In SAN ANTONIO TRACTION CO. vs. ALTGELT, 200 U. S. 304, 50 L. ed. 491, a similar provision of the Texas Constitution of 1876 was under consideration. In 1899 the city granted a franchise to the railway company providing that it should charge five cents fare for one continuous ride, and thereafter in 1903, the Legislature of the State passed a new act requiring street railways to issue and sell half fare tickets for school children. The City of San Antonio sought to compel the railway company to issue and sell such tickets, the company contending that the ordinance providing the five cent fare was a contract and that this later statute reducing the fare impaired the obligation thereof in violation of the Federal Constitution. This Court held that it was not necessary to determine whether or not the ordinance constituted a contract for even assuming that it was a valid contract, it was still subject to the constitutional provision that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made and all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

This provision is substantially the same as that of the Alabama Constitution in the case at bar, and the Court in holding that it made such a contract unenforceable, if it was a contract, used this language (p. 308).

> "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise

of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which, in Sec. 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof."

"An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the Legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the Legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises."

The appellant city in the present case fails to show that it had legislative authority to make the contract it alleges was made with the company because the inhibition of the Constitution against irrevocable grants of privilege stands squarely in the way and as stated by this Court, in the above case, it becomes unnecessary to consider whether such a contract was in fact made.

The appellant also contends that even if there be an exercise of excess powers a contract pro tanto never-

theless exists, and cites the case of City of Manitowoc vs. Manitowoc Traction Company, 145 Wis. 25, and Milwaukee vs. Railroad, 153 Wis. 592, where the construction of the Wisconsin statutes was involved and the Court held that such an ordinance did not constitute a contract. The Milwaukee case was appealed to the U. S. Supreme Court, 238 U. S. 174, 59 L. ed. 1254, and the judgment of the State court was affirmed as being the judicial interpretation of a State statute by the highest court of the State, holding that there was no contract made by the passage and acceptance of the ordinance.

The latest case in this Court on the subject is SAN ANTONIO vs. SAN ANTONIO PUBLIC SERVICE CO., 255 U. S. 547, 65 L. Ed. 777 (1921), affirming the judgment of the District Court, 257 Fed. 467, where the railway company filed its bill complaining that it was unable to earn a fair return on its investment unless permitted to charge a greater fare than five cents as fixed by the city's ordinance, the city having passed a new ordinance prohibiting the company from raising its rates without the city's consent and that the enforcement of the ordinance prevented the company from increasing its rate of fare to seven cents and thereby deprived it of its property without due process of law in violation of the Federal Constitution. The city moved to dismiss the bill on the ground that the five cent fare ordinance constituted a valid contract and therefore the action of the city in refusing to permit the company to raise its fare could not be a taking of its property without due process of law. It was held that the District Court had jurisdiction to enjoin the city from enforcing the five cent fare ordinance and that such ordinance did not constitute a valid contract and that the enforcement thereof was beyond the

powers of the city because the rate being admittedly confiscatory, the enforcement would violate the Fourteenth Amendment. It was further decided that such ordinance was not and could not be a valid contract in view of the provision of the Texas Constitution prohibiting irrevocable or uncontrollable grants of privileges which we have seen in the Altgelt case, supra, is almost exactly the same as that of the Alabama Constitution in the present case. Mr. Chief Justice White delivered the opinion of the Court, and said (p. 555):

> "That, in view of the admitted fact of confiscation, the Court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate,—a result of which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract,—it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.
>
> Primarily, the answer to that question must depend upon whether the Ordinance of 1899, fixing the 5 cents rate, was a contract. That it is not and could not be we are of opinion, as the necessary result of Sec. 17, Article 1, of the State Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges', etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the Ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the Altgelt case, to the effect that *if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right*

inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

And in SOUTHERN IOWA ELECTRIC COMPANY vs. CITY OF CHARITON, and MUSCATINE LIGHTING CO. v. MUSCATINE (decided and reported together), 255 U. S. 539, 65 L. Ed. 764, suit was brought by the Electric Company engaged in supplying electricity under an ordinance conferring a franchise for twenty-five years containing a schedule of maximum rates. After being in effect for some years, suits were brought to prevent the enforcement of the maximum rates specified on the ground that the same were so unreasonably low that the continued enforcement thereof would result in the confiscation of the property without due compensation in violation of the Federal Constitution. The city contended that the ordinance constituted a contract and the court below so held, which, on appeal to the Supreme Court, was reversed, the sole question being the existence of a binding contract as to the rates which were said to be confiscatory and cannot be enforced unless they are secured by a contract obligation. The solution of this question depended upon the power of the city to contract. If such power existed, it must have been conferred by the Iowa Code, Sec. 725, granting to the city power to require a public utility corporation, subject to reasonable rules and regulations, to furnish any person applying therefor along its lines with gas, water, light or power and to supply the city with water for fire protection, etc. and to fix rates for water, gas, heat and electric light or power "and these powers shall not be abridged by ordinance, resolution or contract."

Held that the power thus conferred is a continuing one and could not be abridged or bartered away by contract or otherwise. This Court followed the ruling of the Supreme Court of Iowa construing this section and held the power thus conferred a continuing one that could not be abridged or bartered away by contract or otherwise. Mr. Chief Justice White in applying the provision of the Statute said (p. 546):

> "The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed in enforcing such rates upon the theory of the existence of the contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the State law and of the rule of public policy announced by the court of last resort of the State is urged by municipal corporations whose every power depends upon the State law." Citing numerous cases.

And so in the case at bar there is a total lack of power conferred upon the appellant city to contract for rates for sewer service, and therefore the franchise ordinance was not intended to be and could not be a valid contract fixing irrevocable rates, especially in view of the constitutional provision which the attempted grant of any such power to contract would clearly violate. In this connection it is to be noted that the City Charter provides that the city may contract for maximum rates on light, water and heat to private consumers, but totally lacks any such provision

regarding sewers, and we contend that any attempt to exercise such an alleged power with respect to water, light and heat rates would also be in violation of the Constitution; but the absence of any such provision regarding sewers makes it absolutely certain that the city had no power to fix rates therefor by contract and the legislature never intended to attempt to grant such a power or otherwise it would have been easy to use the same language which was used in reference to the rates for light, water and heat.

In DENVER vs. STENGER, 277 Fed. 865 (C. C. A. Colo. 1922), the Court construed the Constitution of Colorado providing against the grant of irrevocable privileges, franchises and immunities and the effect of certain franchise ordinances specifying street railway fares. The company contended that such rates of fare were confiscatory and would not permit a reasonable and fair return for the use by the public of the property of the company. As in the case at bar, the evidence in regard to the confiscatory character of the rates was not seriously disputed, but the city contended that the ordinance constituted a valid and binding contract in relation to the fares and therefore the question as to whether or not the rates were confiscatory was immaterial, claiming that the acceptance by the company of such franchise ordinance bound the company. The company insisted that there was no power in the city to make such contract and therefore same was unenforceable. The ordinance granting the company a right of way on the city streets to build its railway and provided that it should be entitled to receive a fare of 5 cents and no more for a single passage, etc. Subsequently the city enacted another ordinance fixing a half fare for children and the trial court enjoined such rates which were shown to be confiscatory. The company

contended that the previous ordinance constituted a contract and that the city could not reduce the rates. The Court held that the provision of the constitution clearly prohibited the making of a contract suspending the power of the city to regulate the fares.

The effect of similar constitutional provisions of the States of Texas, Missouri, Louisiana and Iowa are also cited and it is conclusively demonstrated that the section of the Alabama Constitution we are now considering which is more comprehensive than these other provisions, necessarily has the same prohibitive effect.

Appellant's argument attempts to distinguish the case of Denver v. Stenger, supra, from the other cases the court below cites on the ground that the ordinances in question in that case "were not contractual in form or in substance", but neither is the ordinance of the City of Opelika contractual in form or in substance, but is the usual franchise ordinance in such cases, granting authority to build and operate a sewer system and the provision as to the rates is that the "Sewer Company is hereby authorized to charge not in excess of certain rates" (Record pp. 9 and 12). The mere fact that the ordinance contains a provision that upon acceptance of its terms and conditions by the company it shall be a contract between the parties, of course, does not make it a contract legally, as the parties could not change the legal effect by their own mere statement; neither could they supply a want of power in the city to make such a contract. Such a proposition is too plain for argument. Even if the parties intended that it should have the effect of a contract, this would not change the situation, for if the city lacked the power to fix irrevocable rates by contract, then it is manifest that the parties themselves could not create such power by their own agreement, especially where the attempted

exercise thereof is expressly prohibited by the Constitution of the State.

Suppose the Legislature of Alabama had passed a statute expressly authorizing the City of Opelika and other cities in the State of the same class to grant franchises for the construction and operation of gas, water, light, street railway and sewer service and to fix irrevocable rates and charges for same for a period of thirty years; clearly such an act would be in direct violation of the Constitution of Alabama and null and void, and the municipality would have no power under such an act to fix irrevocable rates. And what the Legislature could not do, manifestly the city could not accomplish by attempting to fix irrevocable rates by its ordinance granting a franchise to construct and operate a sewer system, even under the form and guise of an alleged contract. If the Legislature was without power to thus override the Constitutional provision, as it unquestionably was, certainly the municipality, a mere creature of the State, wholly lacked the power to fix irrevocable rates, and the attempt to do so indirectly by an ordinary franchise ordinance is wholly ineffective.

What was said by this Court in the concluding paragraph of the San Antonio case, 255 U. S., at page 558, meets exactly the situation we have in the case at bar. Mr. Chief Justice White said:

> "The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. Home Teleph. & Teleg.

Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50, and cases cited; Milwaukee Electric R. & Light Co. vs. Wisconsin R. Commission, 238 U. S. 174, 180; 59 L. ed. 1254, 1260, P. U. R. 1915 D, 591, 35 Sup. Ct. Rep. 820."

There are two classes of decided cases with distinction clearly marked:

(1) Where a municipality has express legislative authority to contract for public utilities, and to fix rates by contract—as in the Columbus case, cited supra, the parties are bound for the term of their contract.

(2) Where a municipality has no express legislative power to contract for public utilities or to fix rates, or where the powers of the Legislature are restrained by Constitutional limitation as in the San Antonio case, no contractual relation can exist for any fixed period and the rates specified may be changed if found to be either exorbitant or confiscatory.

We respectfully submit that the instant case is clearly in class 2 and therefore the judgment of the District Court should be affirmed.

WM. FINDLAY BROWN,
Attorney for Appellee.

FILED
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WM. R. STANS
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant*,

vs.

OPELIKA SEWER COMPANY, *Appellee*.

Appeal from the District Court of the United States for the Middle District of Alabama.

Brown Printing Co., Montgomery

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant,*

vs.

OPELIKA SEWER COMPANY, *Appellee.*

Appeal from the District Court of the United States for the Middle District of Alabama.

MOTION OF APPELLANT TO ADVANCE CASE.

Comes the City of Opelika, appellant, and moves the court to advance this case, and in support of its motion makes the following brief statement of the matters involved, with the reasons for the application:

BRIEF STATEMENT OF MATTERS INVOLVED.

The appellee Sewer Company brought a suit of injunction in the District Federal Court in Alabama

against the appellant City of Opelika, and sought to enjoin the City from enforcing the rates and charges for sewer service rendered by the Sewer Company to the City of Opelika, and its inhabitants, and to have such rates and charges cancelled and annulled and a new schedule of maximum rates or charges for sewer service put into force and effect. The sole equity of the bill was that the rates or charges for sewer service were so low or small as to be confiscatory, and to compel the Sewer Company to perform the service for such charges would be to deprive it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The theory and contention of the Sewer Company in the trial court was that the City of Opelika had, in the exercise of its governmental or legislative powers and functions, fixed the schedule of maximum rates or charges in question for the sewer service, and that such rates or charges were law fixed rates and were so low as to be confiscatory and therefore in violation of the Federal Constitution. Appellant, the City of Opelika, defendant in the court below, disputed and denied all of the asserted equities in appellee's bill of complaint. It moved the trial court to dismiss the bill of complaint upon the ground that it, together with its exhibits, affirmatively showed upon its face that the maximum rates sought to be annulled, from the enforcement of which the defendant was sought to be enjoined, were not law fixed rates, but were contractual rates, agreed to by and between the appellant and appellee and their respective predecessors in title and in right, and hence that such rates could not be confiscatory in the sense that a State law was in violation of the Fourteenth Amendment to the Federal

Constitution; that the bill of complaint, together with its exhibits, affirmatively showed on its face a lack of equity, and that it showed that the City of Opelika had never had conferred upon it any power to fix maximum or other rates or charges for public sewer service or other public utility; that in fixing the rates and charges in question it was exercising its business, private or proprietary power or function, and not its legislative or governmental power or function; that the ordinance franchise (See pp. 6 to 13 printed record) which contained the schedule of rates and charges complained of, showed upon its face that it was a contract between the Sewer Company and the City of Opelika; that the contract was based upon a sufficient and adequate consideration; that it was binding upon both parties; that the City not only had never had conferred upon it the power to fix rates or charges for sewer service, but had not even attempted so to do in ordaining the ordinance franchise in question.

The trial court having overruled the motion to dismiss because the bill of complaint showed no equitable cause of action and showed that no Federal question was involved or presented to the court for decision, the City then answered the bill of complaint at length, denying all of the asserted equities, setting out all the facts and circumstances showing that the rates or charges in question were contractual and not law fixed; that the particular schedule of rates and charges complained of was proposed by the Sewer Company and that these rates or charges were agreed to by the City of Opelika and thereafter embraced in the franchise ordinance in consideration that the

Sewer Company would construct, operate and maintain a sewer system for the City of Opelika and its inhabitants; that such ordinance franchise contract was entered into and performed by both parties for eighteen or nineteen years without complaint; that the franchise ordinance in question provided for its own forfeiture or termination and conferred upon the City of Opelika the option to purchase the plant and works of the Sewer Company at the end of ten years, and that it was in all things a binding contract and was not a law fixed rate.

The charter of the City of Opelika, which was an Act of the Legislature of Alabama incorporating the City and conferring upon it its rights, powers, privileges, and imposing upon it certain duties as a municipality, was introduced in evidence, and which contains no express power or authority for the City of Opelika to fix rates or charges for any public utilities, but did confer authority and power to provide such public utilities or to contract with third parties to provide and operate such utilities, and as a necessary consequence of such power it had the power to agree by contract upon rates or charges for such public service.

The case was submitted on these issues, a special master was appointed to take evidence as to whether or not the charges were confiscatory, evidence was taken and the special master reported back to the court his findings to the effect that the rates were confiscatory. The court affirmed the report of the special master, granted the relief prayed, thereby annuling the rates which had prevailed for eighteen or nineteen years, enjoined the City of Opelika from enforcing

them, and allowed the Sewer Company to impose and collect rates and charges exactly twice the amount of the rates so annulled, and in effect required the City of Opelika and its inhabitants to pay such rates and charges exactly double the amount which had theretofore prevailed. From that decree the City of Opelika prosecutes this appeal.

REASONS FOR THE APPLICATION.

Since the decision and decree of the trial court, and pending this appeal, the City of Opelika and its inhabitants are, by the decree of the court, required to pay exactly double the amount for sewer service rendered by the appellee Sewer Company and for which it had contracted to furnish such service, and for which it had furnished such service for eighteen or nineteen years.

The City of Opelika had no authority or power, under its charter or other laws of the State of Alabama, to fix rates or charges, and the court has no power and authority to compel it to agree to the rates and charges thus imposed upon the City and its inhabitants by the trial court.

The City of Opelika, having no authority or power, and no such duty ever having been imposed upon it by the Legislature to fix rates, neither the State nor Federal court has the power or authority to compel it to agree to other rates and charges than those which had been voluntarily fixed by contract.

The injunction and other bonds made and executed by the Sewer Company to indemnify or hold the City

of Opelika and its inhabitants harmless against injury or loss, are wholly inadequate unless this appeal can be disposed of at the earliest practicable time by this court; and the pendency of this appeal for a long time would probably result in great damage and inconvenience to the City of Opelika and its inhabitants as to which compensation and remuneration could not be had after the final disposition of this case.

For these reasons the appellant, the City of Opelika, respectfully and earnestly prays this court to advance this case and to give it consideration and decision as soon as is practicable under the rules and practice of this honorable court.

Respectfully submitted,

CITY OF OPELIKA.

By N. D. DENSON & SON,

DICKINSON & DICKINSON,

J. J. MAYFIELD.

The Opelika Sewer Company, by its attorneys, Steiner, Crum & Weil and Barnes & Walker, hereby acknowledges service upon it of a copy of the above motion to advance this case, together with brief statement of matters involved and reasons for the application.

CITY OF OPELIKA *v.* OPELIKA SEWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 524. Argued April 8, 9, 1924.—Decided May 26, 1924.

1. A public service corporation is bound by rates fixed by a valid contract between it and a city even if the rates become so unremunerative that, if imposed under the police power, they would be confiscatory in violation of the Fourteenth Amendment. P. 217.
2. Decisions of the Supreme Court of Alabama construing the state constitution and a city charter, as permitting the city to grant a sewer company the right to operate in the city for a term of years at stipulated rates, subject to power in the legislature to revoke the contract, *held* binding in a suit by the company to obtain relief from the rates on the ground that they had become confiscatory. *Id.*

280 Fed. 155, reversed.

APPEAL from a decree of the District Court which enjoined the above-named city from preventing the plaintiff appellee from putting into effect a new schedule of rates.

Mr. J. J. Mayfield for appellant.

Mr. Wm. Findlay Brown for appellee.

The sole question involved is whether the City had the power to fix irrevocable rates by contract. On behalf of the appellee company it is contended that the franchise ordinance of 1901 did not constitute a contract between the City and the Company in so far as it relates to the rates for sewerage service, because: (1) The City had no power to fix irrevocable rates by contract; and (2) even if the Legislature had attempted to grant such power, it would be in violation of § 22 of the constitution of Alabama.

Appellant's argument is based upon the theory that in granting the franchise the City was acting in its private

business capacity and argues that it could not have been acting in its governmental capacity because it has no power conferred upon it by the State to regulate rates. Appellant then assumes from such alleged lack of power that the City must have had the power to contract for irrevocable rates. The charter expressly grants to the City the power to establish and build sewers and regulate the same, which clearly includes the power to grant the franchise to a public utility company and to regulate the rates, but even if no express power to regulate rates is granted, manifestly, a power to contract for irrevocable rates and thus surrender the police power to regulate for the benefit of the public cannot be inferred merely from the absence of an express grant of power to regulate.

Furthermore, the City in exercising the power granted in its charter to establish and build sewers and regulate the same, and to maintain the health and cleanliness in the City and to this end to adopt and maintain an efficient system of sewerage, was clearly acting in its governmental capacity for the protection of the health of its inhabitants—exercising an express governmental power as provided in its charter.

The power of a city to make an irrevocable contract fixing rates cannot be admitted unless its existence is very clear. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265; *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434; *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517; *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399; *Muscatine Lighting Co.* v. *Muscatine,* 256 Fed. 929; *Southern Iowa Elec. Co.* v. *Chariton,* 255 U. S. 539; *Birmingham Waterworks Co.* v. *Birmingham,* 211 Fed. 497; *Knoxville Gas Co.* v. *Knoxville,* 261 Fed. 283.

Had the power to fix rates by contract been expressly granted to the City, it would be ineffective, as in violation of § 22 of the constitution of Alabama. *Mobile* v.

Mobile Electric Co., 203 Ala. 574; *Birmingham Co.* v. *Birmingham*, 79 Ala. 465; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304; *San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547; *Southern Iowa Elec. Co.* v. *Chariton*, 255 U. S. 539; *Denver* v. *Stenger*, 277 Fed. 865.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the Opelika Sewer Company to enjoin the City against preventing the plaintiff by various means at its disposal from putting into effect a schedule of rates that the plaintiff has proposed. It is to be taken that the present rates, which the plaintiff seeks to increase, are confiscatory unless the City has a right to insist upon them; and the question before us is whether the City has that right by contract or whether its enforcement of them deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States as alleged in the bill. *Cincinnati* v. *Cincinnati & Hamilton Traction Co.*, 245 U. S. 446. The District Court held that there was no valid contract and issued an injunction as prayed. The City appealed to this Court.

The Sewer Company is operating under an ordinance of 1902, which purported to grant the right for thirty years, and to authorize the Company to charge not in excess of rates specified in detail. It also provided that the Company should file a written acceptance, which was done, and that the ordinance "shall thereupon become and be a contract between" the Company and the City. There can be no question that the instrument purported to be a contract and that if it was a valid one it bound the Sewer Company not to charge more than the prescribed rates. *Columbus Ry., Power & Light Co.* v. *Columbus*, 249 U. S. 399. Whether it was valid under the laws of Alabama belongs to the Supreme Court of

the State to decide. The Constitution leaves the matter at large. It is true that it provides that no law "making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and [that] every grant of a franchise, privilege or immunity, shall forever remain subject to revocation, alteration or amendment." No doubt it is true also that the Legislature could not make such a grant indirectly by giving power to a city to make it. But we see no reason to doubt that the Legislature without impairing its power to revoke may give a city power to make a contract from which the city of its own motion may not recede. The City has not attempted to recede from it. So we turn to the charter for light.

The charter of February 20, 1899, gives power "to maintain the health and cleanliness of the city, and to this end to adopt and maintain an efficient system of sewerage," § 11; and further on "to establish and build drains, sewers . . . and to regulate the same" and still later to provide for assessing upon adjacent property a part of "the expense of such sewers as the board may from time to time deem necessary for the purpose of receiving sewerage from houses and lots" &c. These provisions suggest that the Legislature expected the work to be done by the City itself. But it is not the interest of either party to maintain that the whole transaction was void and we shall assume that the City had power to make an arrangement with a company to do the work.

The Alabama decisions construe the State Constitution and such charters to allow a contract to be made, subject to being revoked whenever the Legislature of the State may think fit. *Greenville* v. *Greenville Water Works Co.*, 125 Ala. 625, 639. *Weller* v. *Gadsden*, 141 Ala. 642, 655, 659. *Gadsden* v. *Mitchell*, 145 Ala. 137, 157. *Mobile Electric Co.* v. *Mobile*, 201 Ala. 607, 609.

It seems to us that the words of the charter "to establish and build sewers and to regulate the same" are used

with reference to sewers built by the City and the regulation of the City's own property. They do not go far enough to empower it to regulate prices charged by another—and in short we find no grant of that character elsewhere. But, as we have said, the Alabama decisions sustain the conclusion that the City had the power to make the contract upon which it relies. In *Bessemer* v. *Bessemer City Water Works,* 152 Ala. 391, it was held that a city even though having the power to regulate rates could bind itself by contract, but the precise language of the charter does not appear. The Federal Circuit Court of Appeals in the same jurisdiction takes the same view of the Alabama decisions that we have expressed. *Birmingham* v. *Birmingham Waterworks Co.,* 213 Fed. 450, affirming s. c. 211 Fed. 497.

Decree reversed.